Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

IN THE MATTER OF:

BENJAMIN S. EICHHOLZ,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

I. WHETHER, DUE TO A LACK OF ADEQUATE NOTICE REGARDING THE BANKRUPTCY COURT'S CLAIMS THAT PETITIONER ASSISTED OTHERS IN THE UNAUTHORIZED PRACTICE OF LAW OF THE BANKRUPTCY COURT, ITS DISCIPLINARY INVESTIGATION OF PETITIONER WAS WANTING IN DUE PROCESS AS RECOGNIZED BY THIS COURT IN IN RE RUFFALO, 390 U.S. 544, 88 S.Ct. 1222, (1968).

II. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE BANKRUPTCY COURT REQUIRED PETITIONER TO SPECULATE AS TO THE AMOUNT OF PREPARATION PETITIONER NEEDED TO PROVIDE TO HIS SUBSTITUTE COUNSEL.

III. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE BANKRUPTCY COURT FAILED TO PROVIDE AN IMPARTIAL FACTFINDER DURING PETITIONER'S DISCIPLINARY PROCEEDINGS.

II. PARTIES TO PROCEEDING

Set forth below is a complete list of the persons, associations of persons, firms, partnerships, or corporations, and any other identifiable legal entities related to the party that have been identified as a party to the proceeding as required by Supreme Court Rule 14.1(b):

1. Benjamin S. Eichholz;

2. The Law Office of Benjamin Sheftall Eichholz, P.C.

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V. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OFTHE OPINIONS AND ORDERS ENTERED BELOW

United States Court of Appeals for the Eleventh Circuit:

In re: Benjamin Eichholz, No. 06-14476 (11th Cir. filed January 10, 2007)(*per curiam*).

In re: Benjamin Eichholz, No. 06-14476 (11th Cir. filed February 16, 2007).

U.S. District Court for the Southern District of Georgia:

In the matter of: Benjamin S. Eichholz, Misc. No. 4:06-00029 (S.D.GA filed July 17, 2006).

In the matter of: Benjamin S. Eichholz, Misc. No. 4:06-00029 (S.D.GA filed June 2, 2006).

United States Bankruptcy Court:

Memorandum and Order, United States Bankruptcy Court for the Southern District of Georgia (filed December 5, 2005).

Proposed Findings of Fact and Recommendation for Disciplinary Action, United States Bankruptcy Court for the Southern District of Georgia (filed May 26, 2006).

VI. BASIS OF JURISDICTION

This is an appeal from the decision of the United States Court of Appeals for the Eleventh Circuit affirming the United States District Court of the Southern District of Georgia in its suspension of Petitioner and the Bankruptcy Court's recommendation for suspension of Petitioner from the practice of law in the District Court for a period of two (2) years. The Eleventh Circuit Court of Appeals' decision was filed on January 10, 2007, and denied Petitioner's petition for rehearing and request for oral argument on petition for rehearing on February 16, 2007. Since 28 U.S.C.A. § 1254(1) allows this Court to review matters from the United States Courts of Appeal on the grant of a writ of certiorari, this Court has jurisdiction to review the following matter.

In addition to this Court's jurisdiction based on 28 U.S.C.A. § 1254(1), this Court retains jurisdiction over the subject matter of this dispute as the matter is one of a constitutional nature involving the Fifth Amendment to the United States Constitution. U.S. CONST. amend V. Furthermore, "[b]ar admissions, bar disciplinary actions, and disbarments are essentially judicial in nature and thus present a 'case or controversy' necessary for exercise of federal jurisdiction." In the Matter of Calvo, 88 F.3d 962 (11th Cir. 1996); see, U.S. CONST. art. III, § 2.

VII. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. amend V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

LR 83.5(d), United States District Court for the Southern District of Georgia

"The standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Rules of Professional Conduct shall control. A violation of any of these rules in connection with any matter pending before this Court may subject the attorney to appropriate disciplinary action."

LR 83.5(g), United States District Court for the Southern District of Georgia

"Where in a matter pending before an Article I Judge

it appears that any attorney appearing in case or proceeding, or representing a party in interest in such case or proceeding, has violated any of the rules referred to in subparagraph (d), the Article I Judge may initiate a proceeding in conformity with subparagraphs (a) and (d) through (f) of this Rule, may terminate the proceeding at any stage when the question raised is unsupported or unsubstantiated, and, if the proceeding is not terminated, shall at the conclusion of the proceeding submit to the Chief Judge of this Court proposed findings of fact and, where appropriate, a recommendation for the discipline of the offending member.

The Article I Judge shall file his proposed findings and recommendations with the Court under seal and a copy thereof shall forthwith be mailed by the Clerk to the subject of the disciplinary action, who shall have ten days after service to file written objections to the proposed findings and recommendations.

The Chief Judge of the District Court, or a District Judge designated by him, shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings and recommendations made by the Article I Judge. The Chief Judge or his designee may also receive further evidence or recommit the matter to the Article I Judge with instructions.

This local rule is not intended to limit the power of the Article I Judge to exercise such criminal and civil contempt as conferred by Statute or Rule."

VIII. STATEMENT OF THE CASE

A. Statement of Material Facts

On December 5, 2006, the United States Bankruptcy Court for the Southern District of Georgia entered a Memorandum and Order requiring Petitioner to show cause why he should not be disciplined for his conduct in three prior bankruptcy cases, In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. (See 59-A). In the Memorandum and Order, the charges against Petitioner by the Bankruptcy Court were as follows: (1) that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval from the client; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (See 71-A to 72-A). The Bankruptcy Court's Memorandum and Order dated December 5, 2005 did not request Petitioner to show cause, if any, that he properly supervised nonlawyer employees to ensure their conduct was compatible with the professional obligations of lawyers or that he did not assist nonlawyers in the unauthorized practice of law by having office staff members sign pleadings and perform the functions of a lawyer.

On December 15, 2005, Petitioner filed a response to the Bankruptcy Court's Memorandum and Order. (See 39-

A). In his response, Petitioner addressed the Bankruptcy Court's allegations, discussing at length the reasons he believed his pleadings to that court contained clerical errors, his intra-office procedures for communicating with the courts and his clients, the reasons for any problems regarding his attendance at the hearings for the above-referenced cases, and his substitute's preparation for the pertinent hearings. (See 39-A to 58-A). In attempting to respond to the Bankruptcy Court's claim that Petitioner performed "sloppy" work, Petitioner stated that "clearly these erroneous amounts were amounts contained in a prior Order that our paralegal, Cindy Barnette, utilized for the preparation of this form." (42-A). Consequently, when the Bankruptcy Court charged Petitioner with sloppy work and Petitioner attempted to explain why the clerical mistake had occurred in the pleadings, Petitioner was lulled into a false sense of security that he could rebut the charges without any reciprocal effect.

On January 13, 2006, the Bankruptcy Court conducted its show cause hearing, requiring that Petitioner to show cause, if any, why he should not be reprimanded. (See 27-A). At the commencement of the hearing, Judge Davis, the presiding officer for the Bankruptcy Court, stated that in making its determination, the Court would consider its Memorandum and Order filed on December 5, 2005 and the Petitioner's response to the Memorandum and Order. (See 28-A). After the judge's introduction, the court stated that the Petitioner's should begin his opening statement. (See 29-A). During Petitioner's opening statement, Petitioner's counsel attempted to explain Petitioner's office procedures and any issues regarding Petitioner's representation of his clients in the cases in question. (See 30-A to 34-A).

As Petitioner's counsel concluded the opening statement, Judge Dalis, one of the two sitting Bankruptcy Court judges, interjected that he wanted to state his concerns

so that Petitioner did not conclude his case without addressing the judge's concern. (See 36-A). Judge Dalis then stated, "[M]y biggest concern involving Mr. Eichholz and his office is the fact that he had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed." (36-A). Further, Judge Dalis stated that Petitioner "allowed -- it appears from what I am reading now in your supplemental response – someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it." (37-A).

On May 26, 2006, the Bankruptcy Court issued its "Proposed Findings of Fact and Recommendation for Disciplinary Action." (See 9-A). The Bankruptcy Court stated that its decision was "based on the testimony at the show cause hearing, on supporting documents from Eichholz and others, and on findings in prior proceedings." (10-A). The Bankruptcy Court noted that the root causes of the events that compelled the court's attention were Petitioner's failure to personally manage his case files and communicate with associate and nonlawyer staff. (12-A). Additionally, the court found that its recommendation was based, among other things, on the following findings: (1) that nonlawyer staff explained the terms of engagement to prospective clients; (2) that nonlawyer staff explained settlement documents to clients; (3) that nonlawyer staff signed Petitioner's name to pleadings and other court documents; (4) that Petitioner did not prepare or review bankruptcy pleadings before they were filed, (5) that Petitioner's associate signed his name to pleadings; (6) that nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision; and (7) that many documents were filed with numerous clerical errors. (12-A to 13-A). Out of the eleven findings that the Bankruptcy Court based its

recommendation on, seven of the claims were based on information Petitioner disclosed to the court at the hearing. Based on the findings from both the hearing and the response from Petitioner to the Bankruptcy Court's prior Memorandum and Order, Petitioner was essentially tricked into incriminating himself.

On July 17, 2006, the District Court, relying on a review of the record alone, accepted the Proposed Findings of Fact and Recommendation that the Bankruptcy Court submitted to it pursuant to Local Rule 83.5(g), and entered an Order suspending Appellant from practicing law in the District Court for a period of two (2) years. (See 5-A). On January 10, 2007, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court order, finding that the District Court had neither abused its discretion nor violated Petitioner's due process rights. (See 1-A).

As a result of the Bankruptcy Court's findings and recommendation for disciplinary action and the District Court's adoption of that recommendation, the State Bar of Georgia has begun its process for executing a reciprocal disciplinary action against Petitioner. See GA. RULES OF PROF'L CONDUCT 9.4 (2001). As a result of the Bankruptcy Court's violation of Petitioner's due process rights, Petitioner is prevented from practicing, ultimately concluding his career, in the federal court, and will most likely be prevented from continuing his livelihood at the state court level.

B. Basis for Federal Jurisdiction in the Court of First Instance

Federal courts have the inherent authority to suspend or disbar attorneys practicing before those courts, and this authority derives from the lawyer's role as an officer of the

court before which the lawyer is admitted. See In re Snyder, 472 U.S. 634, 643, 105 S.Ct. 2874 (1985). Moreover, federal courts are authorized under 28 U.S.C.A. §§ 1654 and 2071 to enact rules governing attorney conduct. See 28 U.S.C.A. §§ 1654, 2071. As such, the United States Bankruptcy Court and District Court for the Southern District of Georgia maintained the requisite basis for federal jurisdiction.

IX. REASONS FOR GRANTING A WRIT OF CERTIORARI

A. The United States Bankruptcy Court for the Southern District of Georgia Violated Petitioner's Right to Procedural Due Process as Recognized by the Fifth Amendment to the Constitution When It Failed to Provide Adequate Notice of the Charges Against Petitioner Prior to Petitioner's Show Cause Hearing.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. In this respect, the due process clause recognizes certain procedural safeguards which guarantee that all individuals before the courts be accorded specific fundamental procedures should they be deprived of life, liberty or property; however, the breadth of those safeguards depends on the nature of the proceeding and the interests at stake. See Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961), see, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970). In this context, this Court has recognized that procedural due process safeguards contained in the Fifth Amendment apply to attorney disciplinary hearings due to the quasi-criminal nature of the proceeding. In re Ruffalo,

390 U.S. 544, 550-51, 88 S.Ct. 1222, 1226 (1968).

Under the procedural guarantees recognized by this Court, it is undisputed that when the conduct cited as the reason for discipline does not occur in the presence on judges in open court, "notice should be given to the attorney of the charges made.'" Ruffalo, 390 at 550 (citing Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377(1917)). In the case at bar, the United States Bankruptcy Court for the Southern District of Georgia disregarded Petitioner's procedural guarantee to notice of the charges against him when the court altered the charges against Petitioner after filing its notice, set forth charges different from those for which Petitioner was ultimately punished, and gave notice of charges so vague as to deny Petitioner actual knowledge of the underlying charges. Due to the lower court's failure to provide adequate procedural protections, this Court must grant this Petition for Writ of Certiorari in order to reverse the decision of the Eleventh Circuit Court of Appeals.

1. The Bankruptcy Court failed to give adequate notice of all charges against Petitioner when it amended the charges against Petitioner during the show cause hearing.

Petitioner was deprived of notice that the Bankruptcy Court amended the charges against Petitioner until the conclusion of Petitioner's counsel's opening statement at the January 13, 2006 show cause hearing, resulting in the prejudice to Petitioner, which was irreconcilable at that point. (See 36-A to 37-A). In the Bankruptcy Court's Memorandum and Order, dated December 5, 2005, the Bankruptcy Court gave notice to Petitioner that they were concerned with his inability to attend hearings, his sloppy work, and the possibility that Petitioner had settled cases

without his client's approval. (71-A to 72-A). However, the Bankruptcy Court's Memorandum and Order, which provided Petitioner with information regarding the claims against Petitioner, did not make any mention of the court's expressed concerns that Petitioner filed pleadings that he never signed or read, or that Petitioner had office personnel perform the work of a licensed attorney. (See 59-A to 74-A). As such, when Judge Dalis informed Petitioner's counsel that he wanted Petitioner to address concerns of the court that Petitioner "had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed," (36-A), the court effectively amended the charges against Petitioner to include the violations of assisting non-lawyers in the practice of law and violating his responsibilities to his non-lawyer assistants.

Notice to an attorney of the charges against him is inadequate when the disciplinary authority amends or alters the charges against the attorney either (1) at the disciplinary hearing or (2) at a time so late in the proceeding that the attorney has no opportunity to properly prepare to respond to the charges. See, e.g., Ruffalo, 390 U.S. at 546. In Ruffalo, this Court ruled that an attorney's due process rights were violated when the Ohio State Bar Association failed to provide notice as to the "precise nature of the charges" against the petitioner. Ruffalo, 390 U.S. at 552. The disciplinary panel in Ruffalo had provided the petitioner with notices of the charges against him, and after the petitioner provided testimony at the hearing, the disciplinary panel added an additional charge against the petitioner. Id. at 546. The Ohio State Bar Association argued that there was no violation because the petitioner had several months to respond to the additional charge. Id. at 551, n.4. However, in rejecting the bar association's argument, the Court opined that the bar association's argument "overlooks that fact that

serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled 'into a false sense of security.'" Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). Moreover, the Court stated, "[t]he charge must be known ***before the proceedings commence***. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused." Id. at 551. Due to the bar association's failure to provide notice of all charges prior to the commencement of the hearing, then adding charges once the petitioner incriminated himself, the Court found that the petitioner's procedural due process rights had been violated. Id. at 552. The facts of the instant matter are well within the holding at Ruffalo.

Although the attorney who is under investigation does not have a constitutional right to notice of the *evidence* that the state plans to use to prove the charges against him, see Gray v. Netherland, 518 U.S. 152, 154, 116 S.Ct. 2074 (1996), an attorney under investigation is entitled to notice of the charges which he must defend against, and if those charges are altered after the fact, the attorney's right to due process is violated. Id. (citing Ruffalo, 390 U.S. at 552). In the case at bar, the Bankruptcy Court clearly altered its course of the investigation of Petitioner and effectively amended the charges against Petitioner long after its notice to Petitioner and during the hearing. In the Bankruptcy Court's Memorandum and Order, the court discussed the proceedings from In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley, and then continued by discussing alleged prior instances in which Petitioner was either absent from a hearing or had his fees reduced at a hearing. (See 59-A to 72-A). At the conclusion of the Memorandum and Order, the Bankruptcy Court listed the

charges which it wanted Petitioner to respond to, which said charges were:

> (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime the Court required his presence, and he failed to do that in each of these three cases.
>
> (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these three cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of the three cases and in some, the amount of settlement of attorney's fees contain significant discrepancies.
>
> (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement.
>
> (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent.
>
> (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-

> intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and no professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to "stand in" for.

(71-A to 72-A). These charges clearly do not anticipate claims for assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants.

After Petitioner attempted to explain in his Response to the Memorandum and Order the reasons why he should not be punished for a violation of charges to which he was given notice, the Bankruptcy Court altered its charges and specifically requested that Petitioner address the court's concern that Petitioner allowed "someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it," (37-A). Furthermore, after Petitioner attempted to address these concerns at the show cause hearing, the Bankruptcy Court filed its recommendation to the district court, basing its recommendation almost completely on its findings regarding the new charges of assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants. (See 9-A to 24-A). The charges in the Bankruptcy Court's Proposed Findings of Fact and Recommendation for Disciplinary Action included,

> (1) Nonlawyer staff explained Eichholz's terms of engagement to prospective clients. Transcript of Motions Hearing (hereinafter cited as Tr.) at 63, 127, 176.
>
> (2) Nonlawyer staff explained settlement

documents to clients. Tr. At 112, 121, 155.

(3) Nonlawyer staff routinely signed Eichholz's name to pleadings and other papers filed with the clerk of court. Tr. At 130-32, 137-38, 140, 145, 150. These included pleadings filed during an eleven-day period, after entry of the Show Cause Order while Eichholz was away on vacation. Id. at 155.

(4) Eichholz did not prepare or review bankruptcy pleadings before they were filed. Tr. At 142, 265-66.

(5) Eichholz's associate routinely signed his name to pleadings in accordance with his office procedures. Response of Benjamin S. Eichholz to Memorandum and Order, attached as App. E at 4, 9.

(6) For a significant period of time, Eichholz's associate did not prepare or review bankruptcy pleadings before they were filed, and Eichholz was aware of that fact. Tr. At 273-76.

(7) Nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision. App. F. ¶¶ 2-3.

(8) Many documents were filed with numerous clerical errors. Closing Argument Brief in Support of Benjamin S. Eichholz, attached as App. G. at 6.

(12-A to 13-A). Clearly, the charges included in the

recommendation are substantially different than those upon which the Bankruptcy Court's initial charges were predicated. Since the Bankruptcy Court amended the charges against Petitioner after Petitioner provided testimony in his response and at the show cause hearing, the initial charges were used as a "trap," and Petitioner's right to procedural due process under the Fifth Amendment was eviscerated.

2. The Bankruptcy Court's notice set forth charges different from those for which Petitioner was ultimately punished.

The Bankruptcy Court failed to provide adequate notice of the charges against Petitioner, and ultimately violated Petitioner's right to procedural due process, when Petitioner was initially put on notice in the Bankruptcy Court's Memorandum and Notice of the possibility of discipline for certain specified violations, but was subsequently disciplined for other violations. While this Court has never adopted a definite set of factors to determine whether notice to an attorney in a disciplinary action is adequate, circuit courts and state supreme courts have considered notice inadequate (and therefore a due process violation) when the disciplinary authority makes charges different from those for which the attorney is eventually punished. See In the Matter of the Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981); Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971); Statewide Grievance Committee v. Botwick, 226 Conn. 299, 627 A.2d 901 (1993); Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986). Focusing on the issue of misrepresentation by the disciplining authority, courts have found that the dispositive issue is whether the respondent attorney was apprised of the charges before the commencement of the proceedings against him/her.

Johnson, 447 F.2d at 173.

For example, in Johnson, a committee on professional ethics investigated claims that the respondent-attorney violated rules of professional conduct, and recommended that formal charges be made against the attorney. Id. at 170-71. The district court adopted the findings of the committee on professional ethics, and charged the attorney with violating his duties to his client because he failed to disclose facts about a prior real estate transaction to his client. Id. at 171. Additionally, the district court separately charged the attorney with failing to deal with the additional parties to the real estate transaction candidly because he misled the other parties involved in the transaction into believing that he was their attorney. Id. at 171-72. During the findings, the attorney testified at length concerning the relationship between himself and his client, and did not address any claim that he misled the other parties into believing he was their attorney also. Id. at 173. Since the attorney was not warned of the charge that he misled the other parties until after he had testified about his attorney-client relationship, the Third Circuit Court of Appeals found that the attorney's right to due process had been violated. Id. Subsequently, the court noted that it would be erroneous to speculate how the attorney would have changed his argument had he originally been charged with a breach of the attorney-client relationship. Id.

The Bankruptcy Court in the case at bar charged Petitioner with disciplinary violations *different* from those to which Petitioner was ultimately punished. The Bankruptcy Court's Memorandum and Order listed the charges against Petitioner resulting from three matters to wit: Stanley, Forsythe, and Bacon hearings. As previously noted, the charges against Petitioner included: (1) that Petitioner previously assured the court that he would appear in all cases

in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (71-A to 72-A). However, the District Court ultimately punished Petitioner for violations of the Georgia Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 5.3, and 5.5. (See 5-A).

While some of the charges against Petitioner are contemplated within the violations for which Petitioner was charged, not all charges are encompassed within these violations. For example, the charge that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so and that Petitioner failed to attend all regularly scheduled hearings coincides with Georgia Rule 1.3, which requires a lawyer to act with reasonable diligence in representing his/her client and must not fully abandon or willfully disregard a legal matter entrusted to the lawyer. See GA. R. PROF. CONDUCT 1.3 (2001). As such, the charge against Petitioner arguably coincides with the violation for which Petitioner was ultimately punished.

In contrast, the District Court and the Bankruptcy Court in its Proposed Findings of Fact and Recommendation for Disciplinary Action also charged Petitioner with violating Georgia Rules of Professional Conduct 5.3 and 5.5; however, no charges in the Bankruptcy Court's Memorandum and Order even remotely provided notice that Petitioner was charged with violating Georgia Rules 5.3 or 5.5. (See 59-A

to 74-A). Georgia Rule 5.3 provides that partners in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that conduct is compatible with the professional obligations of the lawyer. GA. R. PROF. CONDUCT 5.3 (2001). Georgia Rule 5.3 only holds a partner responsible when the partner does not make reasonable efforts to ensure that the firm has measures giving reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer, or a lawyer orders, or with the knowledge of the specific conduct ratifies, the conduct involved or the supervisory lawyer/partner knows of the conduct at the time when its consequences can be avoided or mitigated but fails to make reasonable remedial action. Id. Additionally, Rule 5.5 is a multi-jurisdictional rule that a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal practice in that jurisdiction or assist another in doing so. GA. R. PROF. CONDUCT 5.5 (2001).

Similar to the Third Circuit Court of Appeals finding in Johnson and focusing on issue of misrepresentation by the disciplining authority, Petitioner was not apprised of the alleged violations of Georgia Rules 5.3 and 5.5 prior to the commencement of the show cause hearing or the filing of Petitioner's Response to the Memorandum and Order. Since the charges Petitioner was put on notice of were substantially different than those for which Petitioner was ultimately punished, this Court should extend the notice requirement in Ruffalo and find Petitioner's due process rights violated.

3. The Bankruptcy Court's notice contained charges so vague as to deny Petitioner notice of the underlying charges.

This Court should extend the due process notice requirement in this Court's decision in Ruffalo to include

instances in which the complaint or other disciplinary documents are so vague as to deny the attorney notice as to the underlying charges. This Court has never stated that notice to an attorney of a disciplinary investigation or complaint must be of a certain level of specificity to prevent a violation of the attorney's due process rights; however, lower courts have extended the notification requirements to prevent notice requirements from containing vague charges. See Matter of Levine, 174 Ariz. 146, 170, 847 P.2d 1093, 1117 (1993); In re Armstrong, 205 La. 67, 85-6, 16 So. 2d 908, 914 (1943). While it is incumbent upon every attorney in the legal profession to know and understand the rules of the profession, State v. Turner, 217 Kan. 574, 579, 538 P.2d 966, 972 (1975), this Court in Ruffalo was clearly concerned with disciplinary authorities lulling attorneys under investigation into providing additional information to help cement new charges against the attorney in question. See Ruffalo, 390 U.S. at 551, n.4. Based on this Court's policies preventing disciplinary authorities from "trapping" attorneys after testimony has been provided, this Court should find an attorney's due process rights violated when the charges of the disciplinary authority are so vague that they ultimately become a trap, lulling the attorney into testifying to matters which the attorney is unaware are at issue.

In In re Levine, the Arizona Supreme Court found a denial of the attorney's procedural due process rights when the complaint against the attorney was vague. Among the charges against the attorney was the allegation that in two prior cases the attorney violated the code and rules then in effect "by knowingly doing so or doing so through the acts of another." Levine, 174 Ariz. At 152, 847 P.2d at 1099. Focusing on the breadth and vagueness of the charge, the Arizona Supreme Court stated that the charge "did not meet procedural due process by giving the respondent either notice of the alleged acts of misconduct or any realistic

opportunity to defend himself against them." Id. at 170. Due to the vagaries, the court did not accept the commission's findings on the charge.

Here, the Bankruptcy Court, in its Memorandum and Order, provided Petitioner with acts for which they believed Petitioner to be in violation of the Georgia Rules of Professional Conduct; however, the Bankruptcy Court failed to provide any amount of specificity regarding the charges against Petitioner. (See 59-A to 74-A). As previously stated, the Bankruptcy Court charged Petitioner with failing to appear in all cases in which his presence was required and Petitioner failed to do so, filing pleadings that were "sloppy at best and misleading at worst," disbursing settlement proceeds prior to settlement approval, failing to communicate in a professional manner with his clients and settling cases without the clients' consent, and failing to appear at all regularly scheduled hearings, failing to have substitute counsel regularly associated with him appear, and failing to adequately prepare substitute counsel. (71-A to 72-A). Though these factual allegations are specific in and of themselves, they are vague as to the ultimate charge for which the Bankruptcy Court was trying to obtain testimony for. Based upon the final charges against Petitioner, the Bankruptcy Court was clearly fishing for additional charges against Petitioner when it set out these factual allegations which required Petitioner to speculate which violations of the Georgia Rules of Professional Conduct he was being charged with. The charges were vague and lulled Petitioner into providing information for which he did not know would lead to further charges against him, and as such, this Court should find Petitioner's procedural due process right violated.

B. Petitioner's Due Process Rights Were Violated When the Bankruptcy Court Required Petitioner to Speculate as to the Amount of Preparation Petitioner Needed to Provide to His Substitute Counsel.

The Bankruptcy Court's recommendation and the District Court's sanctions against Petitioner stem, in part, from Petitioner's preparation of his substitute counsel in two straightforward, personal injury settlement hearings for $1,000.00 and $7,500.00 respectively. Prior to the settlement hearings in In the matter of: Linda J. Bacon and In the matter of: James J Forsythe and Janice F. Forsythe, Petitioner's substitute counsel, Abda Quillian, obtained the settlement information pertaining to the two personal injury settlements. (76-A). Further, prior to the commencement of the hearings, Petitioner's substitute counsel spoke with the clients concerning each client's settlement agreement and each client's satisfaction with the settlement amounts. (76-A). Despite these methods of preparation for the settlement hearings, the Bankruptcy Court found that Ms. Quillian was ill-prepared. As a result, the Bankruptcy Court recommended, and the District Court affirmed, that Petitioner be sanctioned for failing to adequately prepare his substitute counsel. (See 9-A to 13-A).

When examining a district court's order of suspension, the relevant inquiry is whether the attorney could have been on notice that the courts would condemn the conduct for which the attorney was sanctioned. In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990)(citing In re Ruffalo, 390 U.S. 544 (1968)). Attorney disciplinary hearings are adversary proceedings that are quasi-criminal in nature. See In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222 (1968), cf. Application of Gault, 387 U.S. 1, 33, 87 S.Ct. 1428 (1967). For nearly one hundred years, this Court has

adhered to the principle that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926), International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853 (1914). Moreover, as this Court stated in Lanzetta v. New Jersey, 306 U.S. 451, 458, 59 S.Ct. 618 (1939), "[A]ll are entitled to be informed as to what the State commands and forbids."

Where a law is so vague or indefinite that the public is left uncertain and empty-handed as to the conduct that the law prohibits, or "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," that law fails to meet the standards ingrained in the Due Process Clause. Giaccio v. Pennsylvania, 382 U.S. 399, 402-3, 86 S.Ct. 518 (1966). In this regard, the Court of Appeals for the Eleventh Circuit has established its "standard" in attorney disciplinary matters and found that to determine whether an attorney would have been on notice that his/her conduct would be condemned, the disciplinary authority should examine whether the behavior of the attorney is that which reasonable attorneys would recognize as improper for a member of the profession. See Finkelstein, 901 F.2d at 1564. In Finkelstein, the court of appeals found that the district court erred in sanctioning an attorney for six months where the attorney displayed an "unlawyerlike rudeness" and "gross misunderstanding of true professionalism" through the attorney's methods for advocating settlement negotiations with the opposing party. Id. The court further noted that the district court erred because the attorney could not have known that his method for attempting settlement negotiations would be considered improper and because no reasonable attorney would find

drafting a settlement letter, like the one in Finkelstein, improper for a member of the profession. Id. Since the attorney in Finkelstein had no notice of the impropriety of his act and reasonable attorneys would find no impropriety for the acts, this Court ordered the attorney's suspension vacated and reversed and remanded the case. Id. at 1565.

In the instant case, the Bankruptcy Court's determination that Petitioner failed to adequately prepare his substitute counsel for the settlement hearings in In the matter of: Linda J. Bacon and In the matter of: James J Forsythe and Janice F. Forsythe violated Petitioner's due process rights. No rule exists in the Georgia Rules of Professional Conduct, which the District Court for the Southern District of Georgia subscribes, regarding the amount of preparation that must be provided to substitute counsel. Additionally, with regard to an attorney's own preparation, the comment to Georgia Rule of Professional Conduct 1.1 states that "[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." GA. RULES OF PROF'L CONDUCT 1.1 cmt. 5 (2001). Not only does the rule require attorneys, such as Petitioner, to guess at the meaning of the comment, which exists for the purpose of explaining the even more vague rule, but it also leads to a difference in the application of the rule depending on the party applying the rule. Due to the indefiniteness of the standard, no rule or standard regarding the amount of preparation of a substitute attorney exists at all, and penalizing Petitioner for failing to adequately prepare his substitute counsel violated Petitioner's due process rights.

In addition, the Bankruptcy Court and the District Court violated Petitioner's due process rights because Petitioner was not, in advance, put on notice regarding the

level of preparation he needed to provide his substitute, and no reasonable attorney could find impropriety in Petitioner's actions. Similar to the attorney in Finkelstein, Petitioner could have never been put on notice that providing Abda Quillian with the settlement documentation and her thereafter conversing with the clients prior to the hearing were insufficient. As previously noted, the Georgia Rules of Professional Conduct do not contain a rule pertaining to preparation of substitute counsel. Since the Rules require a lawyer to examine the complexity of the case and the amount at stake, it was reasonable for Petitioner to believe that a minimal amount of preparation for his substitute was required. GA. RULES OF PROF'L CONDUCT 1.1 cmt. 5 (2001). The settlement hearing, at the time, involved two straightforward, personal injury claims, one which was settled for $1,000.00 and the other which was settled for $7,500.00. Moreover, Petitioner's substitute had over twenty years of experience practicing law, and as such, Petitioner's substitute was capable of reviewing a file and understanding its contents. (75-A to 76-A). Since, in the most extreme circumstance, Petitioner's substitute counsel could have obtained any additional information from either Petitioner's office or the clients who were present at the hearings, Petitioner acted reasonably when he simply provided his substitute with the clients' files. Under the reasonable attorney standard put forth by the Eleventh Circuit in Finkelstein, no reasonable attorney would find that Appellants preparations of a twenty year veteran of the court were improper.

C. Petitioner's Procedural Due Process Rights Were Violated When the Bankruptcy Court Failed To Provide An Impartial Decision-maker During Petitioner's Disciplinary Proceedings, Instead Providing a Judge Who Acted As Judge, Jury, Prosecutor and Witness.

The Bankruptcy Court violated Petitioner's procedural due process when it allowed Judge Davis, a non-neutral factfinder, to preside over the show cause hearing and make a recommendation for discipline to the district court and when it allowed Judge Davis to act as prosecutor, judge, jury and witness during the disciplinary proceedings. Judge Davis relied upon cases that were over three-years old, which Judge Davis also presided in, as support for its findings that Petitioner continuously failed in his duties to the court and his clients. The only testimony offered concerning the prior cases came from Judge Davis himself in the Memorandum and Order. (See 65-A to 72-A). No opportunity was afforded Petitioner to question Judge Davis on his recollection of the underlying facts of those cases and the ultimate outcome, nor were the parties from the prior cases called to testify at the show cause hearing.

Moreover, Judge Davis was the presiding judge in In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. Judge Davis ordered the show cause hearing, Judge Davis presided over the show cause hearing, and then Judge Davis recommended a sanction of two (2) years. (10-A, 24-A). Finally, during the show cause hearing, Judge Davis acted outside the scope of his duties by acting as prosecutor and questioning Petitioner's witnesses. Petitioner's due process rights would have been further protected had Judge Davis simply recused himself from the show cause hearing because then it could be said that a neutral fact finder presided. (See 10-A to 24-A).

The central meaning of procedural due process is that a party whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983 (1972)(quoting

Baldwin v. Hale, 1 Wall. 223, 233 (1864)). The right to practice a specifically chosen profession and to hold private employment free from unreasonable government interference is a private interest protected by due process. See Greene v. McElroy, 360 U.S. 474, 492, 79 S. Ct. 1400 (1959). Due process protections, however, are not free from limitation, and "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Matthews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893 (1976). That is, procedural due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances." Id. Rather, procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Id. When determining the confines of due process, courts must weigh the risk that procedures utilized by the court may erroneously deprive an individual of his/her private interest and the probable value, if any, of additional or substitute safeguards. Id. at 335. Additionally, courts must examine the government interest, including the function involved and the fiscal and administrative burdens, that the additional or substitute procedural requirements would entail. Id.

"No matter how complete the panoply of procedural devices which protect a particular liberty or property interest, due process requires that the procedures be applied neutrally." Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982). An impartial decision maker is a basic constituent of minimum due process. See Megill v. Bd. of Regents of the State of Florida, 541 F.2d 1073, 1080 (5th Cir. 1976). In Morrissey v. Brewer, the United States Supreme Court held that Due Process requires that in order to minimize risk that a parolee's parole is not wrongfully revoked, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. 408 U.S. 471, 485, 92 S. Ct. 2593

(1972). While it is not disputed whether Petitioner was provided an evidentiary hearing, it is disputed whether the fact finder's lack if neutrality prevented Petitioner from having a fair hearing in a fair manner. Similar to the Supreme Court's concern in Morrissey with having someone directly involved in the arrest of a parolee also determine parole revocation, here, this Court should find grave concern with the process utilized by the Bankruptcy Court in requesting and administering the show cause hearing for Petitioner.

Additionally, the administrative costs and burdens of providing a neutral fact finder are de minimus. Judge Dalis was already in attendance at the hearing. In light of the fact that the presiding judge should be reading the pleadings in the matter anyway, there would be no significant burden on the court to bring another judge up to speed. In addition, allowing Petitioner to confront his accuser in a meaningful manner (e.g. by allowing the use of direct examination questions) would also appear not to burden the administration of the court. "The risk of an erroneous deprivation of the [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" must weigh in favor of the appellant. Matthews, 424 U.S. at 335.

Finally, the Bankruptcy Court proceedings lacked a neutral fact finder. It was Judge Davis who imposed the discipline. Having already made up his mind, he could not be impartial at the "show cause" hearing, no matter how pure his intentions. The fact finder's lack of neutrality prevented Appellant from having a fair hearing in a fair manner. Judge Davis was the presiding judge in In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. Judge Davis ordered the show cause hearing, Judge Davis presided

over the show cause hearing, and then Judge Davis recommended a sanction of two (2) years. As this Court is aware, Judge Dalis also presided over the hearing. (See 27-A to 38-A). Ironically, Petitioner's due process rights would have been further protected had Judge Davis simply recused himself from the show cause hearing because then it could be said that a neutral fact finder presided. Instead, Judge Davis presided over the hearing and placed his colleague, Judge Dalis, in the unenviable position of having to contradict his colleague's findings, if he disagreed with Judge Davis' interpretation or memory of the prior cases.

The right to practice a specifically chosen profession and to hold private employment free from unreasonable government interference is a right that comes within the "liberty" and "property" clause of the Fifth Amendment to the United States Constitution. Greene v. McElroy, 360 U.S. at 492. The government may subject members of a profession to reasonable regulation; however, the right of an attorney to practice law is a valuable property right which cannot be taken by an arbitrary decision of the court. See State ex rel. Shackelford v. McElhinney, 145 S.W. 1139, 1142 (Mo. 1912). Petitioner deserved a fair trial before an impartial judge; however, Petitioner received a hearing full of procedural irregularities and, ultimately, a career-ending suspension based on one judge's bias.

X. CONCLUSION

Wherefore, Petitioner respectfully requests that this Court grant the PETITION FOR WRIT OF CERTIORARI in the instant appeal.

Respectfully submitted this 13th day of July, 2007.

WEINSTOCK & SCAVO, P.C.

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XI. APPENDIX

A. Eleventh Circuit *Per Curiam* Opinion 1-A

B. District Court Order of Suspension..... 5-A

C. Eleventh Circuit Order on Petition for Rehearing..... 8-A

D. Bankruptcy Court Proposed Findings of Fact and Recommendation for Disciplinary Action 9-A

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Publisher's Note:

Page 1A is under Seal and Unavailable for Filming

Georgia Rules of Professional Conduct by breaching duties owed to his clients under Rules 1.1, 1.2, 1.3, and 1.4 and to his profession under Rules 5.3 and 5.5. The bankruptcy court found that Eichholz knowingly violated Rules 5.3 and 5.5 and violated the other rules with gross negligence. The bankruptcy court further found that these infractions were aggravated by his pattern of misconduct, substantial experience practicing law, lack of acceptance of responsibility, and the vulnerability of his clients. The bankruptcy court issued a report and recommendation to the district court, which recommended a two year suspension of his privilege to practice in the District Court for the Southern District of Georgia followed by a one year probation. The district court reviewed the report and recommendation along with the entire record. The district court adopted the bankruptcy court's findings and imposed the recommended sanctions. On appeal, Eichholz argues that the district court abused its discretion in finding that clear and convincing evidence supported the conclusion that he violated Georgia Rules of Professional Conduct. Further, he asserts that his due process rights were violated and the sanctions were too harsh.

We review disciplinary orders entered by the district court for a clear abuse of discretion. *See In The Matter of Calvo,* 88 F.3d 962, 967 (11th Cir. 1996). "An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005). Federal courts have the inherent authority to sanction lawyers for misconduct. *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990). The Georgia Rules of Professional Conduct and the ABA Model Rules of Professional Conduct govern attorneys practicing before the United States District Court for the Southern District of Georgia. S.D. Ga. R. 83.5(d).

We find that there was clear evidence that Eichholz was repeatedly derelict in his duties to his clients and to the court. At the hearing before the bankruptcy court, Eichholz's clients testified that they lacked significant contact and meaningfully communication with him. One client testified that Eichholz had settled a case without proper settlement authority. Eichholz's former employee testified that she heard from upset clients who did not know that their case was settled or had issues with their settlement. Evidence supports a finding that Eichholz settled cases without settlement authority. In addition, Eichholz repeatedly failed to appear before the bankruptcy court on motion hearings or to ensure the presence of adequate substitute counsel. Furthermore, his former employees testified that non-lawyer employees routinely signed Eichholz's name to documents filed in the bankruptcy court, and that he did not prepare or review these documents before they were filed. Additional evidence showed that Eichholz failed to supervise his employees, allowing these non-lawyer employees to engage in activities that required legal knowledge such as explaining legal documents to clients. Given the evidence, the district court did not abuse its discretion in finding that such conduct clearly violated the Georgia Rules requiring competent representation (Rule 1.1), representation of client's interests (Rule 1.2), diligence (Rule 1.3) and reasonable communication with clients (Rule 1.4), as well as those requiring supervision of non-lawyer employees (Rule 5.3) and prohibiting assisting others in the unauthorized practice of law (Rule 5.5.).

We also find that Eichholz's due process rights were not violated. Eichholz was given both notice and an opportunity to be heard by the bankruptcy court. Eichholz was present at the bankruptcy court's hearing, able to present evidence, and confront witnesses against him. The hearing, which followed an order to show cause, met the standards of procedural due process and the district court could rely on it.

See. Greer's Refuse Service, Inc. v. Browning-Ferris Industries of Delaware, 843 F.2d 443 (11th Cir. 1998) (allowing the district court to rely on state court disciplinary proceedings in imposing sanctions). Finally, while the punishment was harsh, we cannot say that the district court abused its discretion. The American Bar Association Standards for Imposing Lawyer Sanctions provide that suspension is appropriate for a number of Eichholz's actions, including his pattern of pattern of neglect under Standard 4.42, his lack of competence under Standard 7.2. While the sanctions in the Georgia Rules are not binding on the federal courts, it is notable that for all but one of the rules Eichholz violated the maximum sanction is disbarment. Although Eichholz had never been formally disciplined by the District Court of Southern District of Georgia, his prior misconduct was noted in pervious written opinions, and his current practice showed a repeat pattern of disregard for professional standards. Thus, the district court was well within its discretion to impose a suspension.

Because we can discern no reversible error, we affirm the district court's decision and the sanctions imposed.

AFFIRMED.

Filed July 17, 2006, 3:51 P.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN THE MATTER OF	)
BENJAMIN S. EICHHOLZ	)
MISC NO. 4:06-29	)
	)

ORDER

On January 13, 2006, the United States Bankruptcy Court for the Southern District of Georgia ("the Bankruptcy Court") held a closed hearing regarding Benjamin S. Eichholz, an attorney admitted to practice in this District. Mr. Eichholz was ordered to show cause why the Bankruptcy Court should not recommend to this Court that he be subjected to disciplinary action. Following that hearing, on May 26, 2006, the Bankruptcy Court submitted its Proposed Findings of Fact and Recommendation for Disciplinary Action to this Court pursuant to Rule 83.5(g) of this Court's Local Rules. Based on testimony from the show cause hearing, supporting documentation, and the record of prior proceedings, the Bankruptcy Court found that Mr. Eichholz violated Rules 1.1, 1.2, 1.3, 1.4, 5.3, and 5.5 of the Georgia Rules of Professional Conduct.[1] On June 13, 2006,

[1] Rule 1.1 requires a lawyer to provide his client with competent representation with the "thoroughness and preparation reasonably

Mr. Eichholz submitted his objections to the Bankruptcy Court's findings and recommendations.

After a careful de novo review of the entire record in this case, including Mr. Eichholz's objections, the Court concurs with the Bankruptcy Court's Proposed Findings of Facts and Recommendation for Disciplinary Action and adopts them as the opinion of the Court. Accordingly, Mr. Eichholz's privilege to practice in the United States District Court for the Southern District of Georgia is **SUSPENDED** for two years. Upon the conclusion of the suspension period, Mr. Eichholz may apply for readmission in accordance with Local Rule 83.3. Should he be reinstated, Mr. Eichholz shall be placed on probation for an additional year. During this probationary period, his practice shall be subject to monitoring, at his expense, in order that the Court may be satisfied that he is fit for readmission to an unrestricted practice before this Court.

It is further ORDERED that while all other pleadings in this matter shall remain sealed, this Order shall not be filed under seal.

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necessary for the representation." Ga. R. Prof'l Conduct 1.1. Rule 1.2 obligates a lawyer to "abide by a client's decision concerning the objectives of representation" including the decision to accept or reject a settlement offer. Ga. R. Prof'l Conduct 1.2. Pursuant to Rule 1.3, a lawyer must act with reasonable diligence in representing a client and must not "willfully abandon or willfully disregard a legal matter entrusted to the lawyer." Ga. R. Prof'l Conduct 1.3. Rule 1.4 requires a lawyer to communicate with his client and to keep the client reasonably informed about the status of matters. Under Rule 5.3, a partner in a law firm must ensure that the firm's nonlawyer employees are properly supervised and that the nonlawyers conduct is compatible with the professional obligations of a lawyer. Ga. R. Prof'l Conduct 5.3. By failing to supervise a nonlawyer employee in compliance with Rule 5.3, a lawyer may aid the employee in the unauthorized practice of law in violated of Rule 5.5. Ga. Rs. Prof'l Conduct 5.3 & 5.5.

SO ORDERED, this 17th day of July, 2006.

/s/ William T. Moore, Jr.
William T. Moore, Jr., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

/s/ B. Avant Edenfield
B. Avant Edenfield
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

SEALED SEALED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14476-QQ

Filed February 16, 2007

IN RE: BENJAMIN EICHHOLZ,
Appellant.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: ANDERSON, BIRCH and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

ORD-41

9 - A

Filed May 26th, 2006, 1:40 P.M.

IN THE UNITED STATES BANKRUPTCY COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

LINDA J. BACON
Chapter 13 Case
n/k/a Linda J. Peters

Number 03-44067

Debtor

JAMES L. FORSYTHE
Chapter 13 Case
JANICE F. FORSYTHE

Number 04-42195

Debtors

SABRINA N. STANLEY
Chapter 7 Case

Debtor

Number 05-41600

PROPOSED FINDINGS OF FACT AND RECOMMENDATION FOR DISCIPLINARY ACTION

Introduction

On January 13, 2006, this Court held a closed hearing at which Benjamin S. Eichholz was ordered to show cause why we should not recommend disciplinary action to the Chief United States District Court Judge under Local Rule 83.5 ("Show Cause Hearing"). Based on testimony at the show cause hearing, on supporting documents from Eichholz and others, and on findings in prior proceedings, we find that Eichholz has violated Rules 1.1, 1.2, 1.3, 1.4, 5.3, and 5.5 of the Georgia Rules of Professional Conduct ("Georgia Rules").

Accordingly, we recommend that Eichholz's privilege to practice in the United States District Court for the Southern District of Georgia be suspended for two years. ABA Standards for Imposing Lawyer Sanctions Standard 2.3 (1991). We further recommend that upon reinstatement, Eichholz be placed on probation for an additional year and be subject to such monitoring of his practice, at his expense, as may be necessary to satisfy the United States District Court for his readmission to unrestricted practice before the Court.

Findings of Fact

This Recommendation for Disciplinary Action ("Recommendation") is predicated upon the following cases filed in the United States Bankruptcy Court for the Southern District of Georgia: In re Bacon, Chapter 13 case number 03-44067; In re Forsythe, Chapter 13 case number 04-42195; and In re Stanley, Chapter 7 case number 05-41600. The bankruptcy court sets out its specific concerns in a Memorandum and Order entered in each of the three cases on December 5, 2005 ("Show Cause Order"), attached to this Recommendation as App. A.

The Recommendation also reflects our consideration of findings of fact and conclusions of law in the following Chapter 13 cases: In re Atkins, case number

01-40125; In re Thornton, case number 04-51703; In re Glover, case number 01-43454; and In re Fuller, case number 01-40412. Relevant orders and opinions in these cases are attached as Apps. B, C, and D, respectively.

We characterize the story that unfolded at the Show Cause Hearing and in supporting documents as "A Tale of Two Law Firms" (with apologies to Charles Dickens).

At Law Firm Number One, as described by Eichholz and his current employees, a bright line divides the tasks staff may perform from the tasks a lawyer must perform. Specifically, Eichholz has clearly instructed his staff that no one is ever to sign his name on any document that will be filed with the court. Moreover, Eichholz himself is now personally involved in drafting, reviewing, and filing bankruptcy pleadings.

At Law Firm Number Two, as described by Eichholz's former employees, nonlawyer staff prepared and signed Eichholz's name to all manner of documents, including pleadings. According to Eichholz, he had no idea that staff were signing his name to pleadings (although we conclude that he was in fact at least complicit with this arrangement). Furthermore, he did not look at client files, and he did not know whether and when hearings were noticed.

We find the scenario at Law Firm Number Two problematic, and we enumerate specific incidents below. We also note that while Eichholz correctly understands that he is solely responsible for all the operations of his office, including the actions of his staff, we are unpersuaded by his continued insistence that had he

know of the problems, he would have corrected them immediately.

Eichholz's professed ignorance of the problems was the biggest problem at Law Firm Number Two. The degree to which he neither personally managed his case files nor communicated with the associate and nonlawyer staff he assumed were managing the files is the root cause of the events that have compelled our attention.

Moreover, we find that not only was Eichholz disengaged from day-to-day case management, he also was disengaged from his clients. We recognize that indirect communication through non-lawyer intermediaries can be entirely appropriate, depending on the nature of the information to be communicated. However, virtually all contact between Eichholz's office and Eichholz's clients occurred through nonlawyer intermediaries, to an extent we conclude is incompatible with competent representation.

We find or adopt prior findings that:

(1) Nonlawyer staff explained Eichholz's terms of engagement to prospective clients. Transcript of Motions Hearing (hereinafter cited as Tr.) at 63, 127, 176.

(2) Nonlawyer staff explained settlement documents to clients. Tr. at 112, 121, 155.

(3) Nonlawyer staff routinely signed Eichholz's name to pleadings and other papers filed with the clerk of court. Tr. at 130-32, 137-38, 140, 145, 150. These included pleadings filed during an eleven-day period, after entry of the Show Cause Order, while Eichholz was away on vacation. Id. at 155.

(4) Eichholz did not prepare or review bankruptcy pleadings before they were filed. Tr. at 142, 265-66.

(5) Eichholz's associate routinely signed his name to pleadings in accordance with his office procedures. Response to Benjamin S. Eichholz to Memorandum and Order, attached as App. E at 4, 9.

(6) For a significant period of time, Eichholz's associate did not prepare or review bankruptcy pleadings before they were filed, and Eichholz was aware of that fact. Tr. at 273-76; Motion to Intervene filed by Hamilton on January 5, 2006, attached as App. F ¶¶ 2-4.

(7) Nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision. App. F ¶¶ 2-3.

(8) Many documents were filed with numerous clerical errors. Closing Argument Brief in Support of Benjamin S. Eichholz, attached as App. G at 6; App. F ¶ 2.

(9) Eichholz did not look at case files and was unaware whether and when hearings were noticed. Tr. at 268.

(10) Eichholz repeatedly failed to appear at hearings and failed to ensure that substitute counsel were equipped to represent his clients' interests. App. A at 2-4, 7, 11-12; Letter Response from Chapter 7 Trustee Mary Jane Caldwell, attached as App. H.

(11) Eichholz settled cases without authority from his clients. App. C at 4, 5; Tr. at 61, 69, 80, 82.

Ethical Violations

Ethical violations must be proved by clear and convincing evidence. ABA Standard 1.3. We find clear and convincing evidence that Eichholz violated the Georgia Rules, specifically:

Rule 1.1 – Competence
Rule 1.2 – Scope of Representation
Rule 1.3 – Diligence
Rule 1.4 – Communication
Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants
Rule 5.5 – Aiding a Nonlawyer in the Unauthorized Practice of Law

We separate these violations conceptually into two broad categories. Violations in the first category arose from Eichholz's abdication of responsibility for his case files and from his failure to supervise subordinates. Violations in the second category arose from Eichholz's failure to communicate with his clients.

I.

The first category includes violations of Rules 5.3 and 5.5. This category also includes concomitant violations of Rules 1.1 and 1.3.

Rules 5.3 and 5.5

Rule 5.3 provides that "a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that [a nonlawyer employee's] conduct is compatible with the professional obligations of the lawyer." Georgia Rule 5.3(a). Failure to supervise a nonlawyer employee in violation of Rule 5.3 can in effect aid the nonlawyer employee in the

unauthorized practice of law in violation of Rule 5.5. Formal Advisory Opinion No. 00-2 (Ga. 2000).

What activities constitute the unauthorized practice of law is a fact-driven inquiry. Doe. v. Condon, 532 S.E.2d 879, 881 (S.C. 2000). The central question is "whether the representation of the client has been turned over, effectively, to the nonlawyer." Formal Advisory Opinion No. 00-2.

We conclude that Eichholz failed to supervise his nonlawyer staff to the extent that they in effect represented Eichholz's clients. Evidence shows that nonlawyer staff performed tasks that required legal knowledge and judgment, including meeting with clients to explain legal documents. In at least one instance, a client thought the nonlawyer explaining Eichholz's terms of engagement was a lawyer, testifying that the nonlawyer signed the contract in the attorney block. Tr. at 176.

Moreover, nonlawyer staff signed Eichholz's name to bankruptcy pleadings that were prepared and subsequently filed without attorney supervision. Former office employee Cindy Barnett testified that she signed Eichholz's name as a matter of routine on documents in bankruptcy courts as well as other courts and that office staff "always signed a number of different kind of documents for Mr. Eichholz." Tr. at 132. Furthermore, his former associate Nicole Hamilton testified that Eichholz's signature was signed to different documents "by mostly everybody in the office" and that "there was rarely much the Mr. Eichholz ever personally signed." Id. at 285-86. Under the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure, an attorney must sign all pleadings. See Fed. R. Bankr. P. 9011; Fed. R. Civ. P. 11.

Eichholz insists he did not know that nonlawyer staff prepared, signed, and filed pleadings without attorney supervision. Tr. at 25, 252, 258; App. G at 8. Eichholz says he believed his associate was signing and supervising the preparation and filing of bankruptcy pleadings. Id. at 7-8. He asserts that he did not know until January 9, 2006, that Barnett actually signed the pleadings. Amendment to Response of Benjamin S. Eichholz to Memorandum and Order, attached as App. I.

To the contrary, we conclude that Eichholz in fact knew long before January 9 that nonlawyer staff signed pleadings and that he at least tacitly approved this protocol. Hamilton testified that she told Eichholz she would sign pleadings she did not prepare. Tr. at 273-74. Barnett also testified that she told Eichholz the same thing; that Hamilton would not sign documents that she herself did not prepare. Id. at 151.

The record thus shows that Eichholz knew Hamilton was not signing bankruptcy pleadings. Moreover, the record is devoid of any evidence that Eichholz himself signed them. If Eichholz did not sign bankruptcy pleadings, and he knew Hamilton did not sign them, the Eichholz unquestionably knew that nonlawyer staff signed pleadings, because there were no other lawyers in Eichholz's law office besides Eichholz and Hamilton.

Rules 1.1 and 1.3

Professional competence requires "thoroughness and preparation reasonably necessary for the representation." Georgia Rule 1.1. Reasonable diligence requires that a lawyer not "willfully abandon or willfully disregard a legal matter entrusted to the lawyer." Georgia Rule 1.3.

Eichholz violated Rule 1.1 and Rule 1.3 by

- Failing to either himself review or confirm that his associate reviewed bankruptcy pleadings before they were filed, resulting in the submission of documents with numerous clerical errors;

- Failing to review case files to know whether and when hearings were noticed; and

- Failing to either himself attend hearings or ensure that substitute counsel were adequately prepared to attend in his stead.

A lawyer must control his work load so that each matter is adequately handled. Georgia Rule 1.3 cmt. We understand that Eichholz's office was "extremely busy." Tr. at 25. We conclude that it apparently was too busy for Eichholz to provide the competent and diligent representation to which his clients were entitled.

II.

Rules 1.4 and 1.2

The second category includes violations of Rule 1.4 and 1.2. Violations in this category arose from Eichholz's failure to communicate with his clients.

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information." Georgia Rule 1.4.

The record shows that Eichholz consistently failed to meet this standard. He did not talk to clients at the beginning of the representation to discuss their claims or the terms of his engagement. He did not talk to clients following settlement of their cases to explain the terms of the settlement agreement.

One client testified that "the first time [she] heard his voice" was when she gave Eichholz settlement authority on the phone. Tr. at 173. This same client testified that the first time she ever saw Eichholz was when she went to his office to pick up her file after her case had settled. Id. at 163. A second client testified that she spoke to Eichholz once on the phone and saw him for the first time at the Show Cause Hearing. Id. at 63.

In addition to communicating with the client as required by Rule 1.4, a lawyer must abide by a client's decision whether to accept a settlement offer. Georgia Rule 1.2. The record includes a finding in the Atkins case that "Eichholz and his staff rushed Debtor into making a decision" about settlement. App. B at 9. See also discussion of Stanley case, p. 13, *infra*. Moreover, Hamilton testified about clients who would "berate me, or get highly upset because they would argue with me that they didn't know their case was settled, or they weren't happy with the settlement, or they had other issues with the settlement." Tr. at 287-88. See also id. at 278-79.

However, we find clear and convincing evidence that Eichholz had no settlement authority only in the Forsythe case. In addition, we adopt the bankruptcy court's prior finding that Eichholz had no settlement authority in the Thornton case.

Factors Considered for Sanctions

Lawyer disciplinary proceedings "are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct." In re Brown, 813 So. 2d 325, 328 (La. 2002). The ABA Standards provide guidance in matching the level of sanctions with the gravity of the offense. People v. Smith, 74 P.3d 566, 573 (Colo. 2003). The following factors should inform the court's decision concerning sanctions: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the violation; and (4) any aggravating or mitigating circumstances. ABA Standard 3.0.

(1) Duty Violated

In this case, Eichholz has violated duties owed to the client (Rules 1.1, 1.2, 1.3, and 1.4); and duties owed to the profession, to the legal system, and to the public (Rules 5.3 and 5.5). These infractions are serious. The maximum penalty for violation of each of these rules except one is disbarment.[1] Georgia Rules 1.1, 1.2, 1.3, 5.3, 5.5.

(2) Mental State

A lawyer may commit an ethical violation either intentionally, knowingly, or negligently. ABA Standard 3.0. Eichholz knowingly violated Rules 5.3 and 5.5 and negligently violated Rules 1.1, 1.2, 1.3, and 1.4. Furthermore, the extent of his detachment form case management and clients exceeds simple negligence, rising to the level of gross negligence.

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[1] The maximum penalty for violation of Rule 1.4 is a public reprimand. Georgia Rule 1.4.

(3) Injury

Arguably, Eichholz's misconduct caused little or no injury to his clients. All clients received money in settlement of their claims, albeit not as much as they may have thought the claims were worth.

However, the extent of harm can be difficult to measure. In Thornton, the Court found that although the client agreed to the settlement, that agreement was given after the fact and under circumstances which gave the appearance that the debtor, who suffered from some communication disability, had been pressured by his counsel. App. C at 10.

In Stanley, the client sought a second opinion and was informed that, despite the fact that she had lingering back problems, the second attorney could not do any better for her because "[Eichholz] had already made a settlement on it." Tr. at 169. The second attorney further told her that after she paid both him and Mr. Eichholz, she would net the same amount, at which point "[her] hands were tied." Id. at 166.

In Forsythe, the clients also obtained a second opinion from counsel who felt the settlement was "probably reasonable," and further that State Farm would likely assert – and in fact did assert – that a binding settlement had already occurred. Tr. at 56-57. Faced with this reality, the Fosythes "consented" to the settlement, but understandably felt mistreated. They had appeared in court in November when "Mr. Eichholz or none [sic] of his associates bothered to show up," so by January they reached the point that they simply "would like to end it." Id. at 67. Mr. Forsythe, who had called Eichholz to question his authority to settle, testified in compelling fashion that "I'm a human being just like he is" and that it made him angry when Eichholz told

him to "come in and personally thank [Eichholz] for what he had done from [him]." Id. at 83.

Finally, in Atkins, Debtor consented to a settlement, but her husband, whose release was required, did not. App. B at 5. When the debtor then revoked her settlement authority, she was told she could not change her mind. Id. Further, although Eichholz filed suit on her behalf, he never perfected service, so that by the time of the hearing on the motion to approve, more than two years had elapsed since the date of the injury and her cause of action was likely barred by the statute of limitations. Id. at 9.

The more clear-cut injury is to the integrity of the bankruptcy system through Eichholz's allowing staff to file pleadings and other papers he ostensibly had signed but that he in fact had never even seen. Rule 9011 of the Federal Rules of Bankruptcy Procedure requires that an attorney sign " every petition, pleading, written motion, and other paper." Fed. R. Bankr. P. 9011(a). The Federal Rules of Civil Procedure include the same rule. See Fed. R. Civ. P. 11 (a).

The principle behind both versions of this rule is that attorneys have a professional responsibility to the judicial system. By signing a pleading, motion, or other paper, the attorney certifies "to the best of the person's knowledge, information, and belief" that the submission is proper, the legal contentions are warranted, and the allegations and denials are likely to have evidentiary support. Fed. R. Civ. P. 11(b)(1)-(4). Eichholz subverted the purpose of this rule by causing the filing under his "signature" of pleadings that he in fact did not sign.

(4) Mitigating and Aggravating Circumstances

Aggravating circumstances may justify an increase in the degree of discipline imposed. ABA Standard

9.2. Mitigating circumstances may justify a reduction in the degree of discipline imposed. ABA Standard 9.3.

We note four aggravating circumstances in the present case. First, Eichholz has exhibited a pattern of misconduct. The Bacon, Forsythe, and Stanley cases showcased only his most recent ethical infractions. In 2005, the bankruptcy court found that Eichholz had violated Rules 1.1 and 1.4 in the Thornton and Atkins cases. App. C. at 9; App. B at 8. In 2003, the bankruptcy court noted a "series of actions, omissions, and late-filed motions on the part of Mr. Eichholz" in the Glover and Fuller cases. App. D at 8.

The Court dealt with prior misconduct by severely reducing the attorney's fee awards in those cases after receiving assurances from Mr. Eichholz that he would mend his ways. App. A at 10-11; 15; App. D at 8. This repeated pattern in light of that history illustrates that no less severe option than that which we recommend is likely to be effective. Moreover, the Court has previously ruled in a disciplinary matter that even when limited to a single case, failure to appear twice and inadequate supervision of staff merited discipline. Disciplinary Proceeding, In re Johnson, attached as App. J.

Second, Eichholz has substantial experience in the practice of law. According to his website, Eichholz has been a member of the bar for the past thirty years. The Law Office of Benjamin Sheftall Eichholz at http://www.injurylawyer.org/about.html last visited (April 10, 2006).

Third, there has been no meaningful acceptance of responsibility. See, e.g., App. D at 4. Further, in Eichholz's initial response to the Show Cause Order, he continually asserted that essentially all the errors could have

been corrected if someone else had done his job for him. See App. E at 2, 3, 4, 6, 7.[2]

Fourth, the clients in these cases were vulnerable. Chapter 13 debtors are often unsophisticated and not highly educated. As such, they depend even more than the average lay person upon advise of counsel in deciding legal questions. Furthermore Chapter 13 debtors are in financial distress and thus susceptible to the lure of a quick monetary settlement that may or may not be wholly compensatory. As typical Chapter 13 debtors, the clients in these cases depended on Eichholz for a degree of professional concern and advocacy that he simply did not provide.

We also note mitigating circumstances. First, Eichholz has no prior disciplinary record. Second, he has fully cooperated in these disciplinary proceedings. Finally, he once again proclaims to have taken steps that he assures us will prevent future violations.

Recommended Sanctions

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[2] "The claim of Ms. Bacon could have very easily been handled by simply asking Mr. Bacon the facts surrounding her claim...." p.2.

"[T]he Court could have merely instructed [substitute counsel] to meet with Ms. Bacon outside of the Courtroom...." p.3.

"[T]wo clerical errors which could have easily been corrected either by [substitute counsel] if this was pointed out to her or by the Court itself." p.4.

"Once again if the Court would have merely inquired of [substitute counsel[and tried to elicit this information, the Court could have simply instructed her...." p.6.

"If Ms. Forsythe had been questioned at the hearing she could have explained to the Court...." p.7.

Suspension is appropriate when a lawyer continues to engage in misconduct after having been reprimanded for the same or similar misconduct. ABA Standard 8.2. While Eichholz has not received a formal reprimand, his misconduct has been noted in written opinions issued in seven cases over the last three years. In spite of these several and specific expressions of the court's concern, Eichholz has heretofore given only lip service to reforming his practice. We consequently give little weight to mitigating factors and instead emphasize the aggravating factor of the pattern of misconduct.

Generally suspension should be for a period of at least six months. ABA Standard 2.3. A shorter suspension functions as a fine on the lawyer and is not effective in protecting the public. Id. Commentary.

Accordingly, we recommend that Eichholz's privilege to practice in the United States District Court for the Southern District of Georgia be suspended for two years. We further recommend that upon reinstatement, Eichholz be placed on probation for an additional year and be subject to such monitoring of his practice, at his expense, as may be necessary to satisfy the United States District Court of his rehabilitation and fitness for readmission to unrestricted practice before the Court.

We further recommend that any action taken by the Court be communicated to the State Bar of Georgia.

/s/ Lamar W. Davis, Jr.
Lamar W. Davis, Jr.
Chief United States Bankruptcy Judge

/s/ John S. Dalis
John S. Dalis
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 26th day of May, 2006.

APPENDIX

A - In re Bacon; In re Forsythe; In re Stanley; Memorandum and Order
December 5, 2005, 18 pages

B - In re Atkins, Memorandum Opinion
December 23, 2005, 12 pages

C - In re Thornton, Memorandum and Opinion
August 8, 2005, 15 pages

D - In re Glover; In re Fuller, Order Approving Application for Employment and
Order on Request for Determination of Attorney's Fees
June 16, 2003, 11 pages

E - Response of Benjamin S. Eichholz to Memorandum and Order
December 15, 2005, 28 pages

F - Motion to Intervene filled by L. Nicole Hamilton-King
January 5, 2006, 4 pages

G - Closing Argument Brief in Support of Benjamin S. Eichholz
March 9, 2006, 19 pages

H - Letter Response by Mary Jane Cardwell
December 28, 2005, 2 pages

I - Amendment to Response of Benjamin S. Eichholz to Memorandum and Order
January 11, 2006, 4 pages

J - In re Johnson, Disciplinary Proceeding
July 29, 2004, 4 pages

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN THE MATTER OF

BENJAMIN S. EICHHOLZ

Savannah, Georgia

January 13, 2006

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE LAMAR W. DAVIS, JR. and

HONORABLE JOHN DALIS, JR.

UNITED STATES BANKRUPTCY JUDGE

Transcriber

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Judge pursuant to Rule 83.5, as I have already stated.

The record the Court will consider in making this determination will include as a preliminary matter, the following items. First, the order that brings us here, the order dated December 2nd, and filed on the 5th, in the cases of Linda Bacon, James and Janice Forsythe, and Sabrina Stanley.

Number two, Mr. Eichholz's response filed December 15th, 2005, and the amendment that was filed on his behalf by Mr. Buschbaum on January 11th, 2006.

Three, the letter of John Pytte, attorney at law, dated December 21, 2005 and filed December 22nd, 2005 in the Stanley case.

Four, the letter dated December 28th, 2005 of Mary Jane Cardwell, Chapter 7 Trustee in this District.

Five, the motion to intervene of Nicole Hamilton-King filed on January 5th, 2006.

The Court will also take judicial notice of all matters of record in the files in the Bacon, Forsythe, and Stanley cases, in the previous cases handled by Mr. Eichholz cited in the order dated December 2nd, and any other rulings of the Court relevant to the issues at hand.

I note that Mr. Pytte has now entered the courtroom. I think that is the only change we have to those in attendance

from a strategic standpoint handle it the way you see best. But I think we've got an order. Judge Davis has made certain findings and asked Mr. Eichholz to respond to these determinations that he has made in this order. And here we are.

MR. BUSHBAUM: Your Honor –

JUDGE DAVIS: And I should say that I think you will have the final word. I mean, you make an initial presentation. We'll hear from, if they desire to be heard, we'll hear from the other parties who are here. But you will have certainly the opportunity to rebut and to present a summation at the conclusion of any evidence we hear from parties or individuals other than Mr. Eichholz.

MR. BUSHBAUM: All right, Your Honor. Just – and I will be very, very brief, Your Honor, in this statement. And that is, I want to Court to understand that some of these issues that have occurred were some internal problems within Mr. Eichholz's office. For example, I mean, there were a number of misstatements of amounts involved in various settlements. Plus, Mr. Eichholz, on two of these matters where there was a schedule for a hearing, he had engaged the services of another counsel, Ms. Quillian, to attend those two matters. They were hearings on the same day. Because he had to go to a funeral the day that was scheduled.

But in any event, Your Honor, he has really revised a number of procedures within his office, and he has a new staff who are handling the matters in a way that I think was suggested by the Court that they should have been handled. We will recognize that some of these past problems did exist. But since this time, for example, the procedures and new staff members have been handling matters differently. There have been a number of applications for representation as counsel that have been filed since that time individually, not to seek retroactively along with the application for approval of a settlement. So, these are matters that I think, Your Honor, are now being handled in the manner in which the Court had wanted them to be handled all along. And we do have members of his staff who are here to testify. There are also other counsel who would be willing to be able to testify. Particularly, there was an attorney who was present at the hearing on the Bacon and Forsythe matters who would be able to state that what happened when Ms. Quillian had been asked to handle this particular aspect for Mr. Eichholz. And we believe that Ms. Quillian would have had plenty of opportunity to have gotten hold of all the facts that were necessary, even by discussing it with --

JUDGE DAVIS: Did you say she is here or somebody else?

MR. BUSHBAUM: No. She is not here. But Ms. Register

is here. And she was present at those hearings, and she would be able to explain that aspect of it, Your Honor.

Incidentally, and we do have for the Court now, and for the Bacon and Forsythe cases, we do have the settlement checks received by the insurance companies on both of those that Mr. Eichholz is ready to endorse and turn over to the Court, or to the Trustee, or to the parties also, so that – because we do believe in discussions with their counsel that those settlements are satisfactory to those parties. So, we would think that could very well be handled.

And also I would like the Court to know, Your Honor, about Mr. Eichholz on a personal and ethical basis. He is extremely ethical. He is a great person in this community. Just as one minor example, he is the largest contributor to the United Way of any member of the Bar. It shows what his interest is in this community, and other things of that sort that I think are important for the Court to understand, that the type of person that he is.

I don't believe there's anything involved in any of these issues that would question his ethics. It was a matter, as was noted, there were some problems within his office that he was not totally aware of at the time. Of course, as the person who is in charge of the office, he has the responsibility for it. That he understands, and we understand, that whatever is filed from his office is his

responsibility.

Now, that this is again come before him, brought to light by this memo and order from the Court, he has made changes in his office procedures and in his office personnel. And as I say, since the beginning of November, this past November, he has handled the cases in exactly the manner in which the Court has said they should be handled. And he has filed his applications for appointment, and not filed them simultaneously with an affidavit for approval of a settlement, and when and if any hearing is scheduled, it is every intention of his, particularly if they are held locally, to attend those hearings. If they are far enough out of town that makes it difficult for him, he will attempt to get someone in the other community to do so.

As Your Honor he knows, he did on Tuesday, on a case that Your Honor was hearing in Dublin. And he had counsel there handling the matter on his behalf, and again, this is something that he would make certain that he gets done in any matters in which there are hearings.

I don't know whether the court intend necessarily to have hearing on the initial filings of the application for approval of counsel. If the Court insist on having a hearing for those things, then, of course, we will make certain that he or someone on his behalf attends it, though, I do believe, Your Honor, that primarily the ones that

require hearings are the ones on the approval of a settlement, which involves the contract. Basically they are all contingent fees contracts. And of course, we understand that the Court can adjust the attorneys' fees and part of that.

Another things is that Mr. Eichholz's new contingent fee contract indicate that if there is any bankruptcy involved that the contract must be approved by the bankruptcy court. And also, even on the old contracts, the client was instructed to inform Mr. Eichholz and his office if in fact a client was in bankruptcy.

Of course, now, with the accessibility online, Mr. Eichholz's office is in the position to be able to find out of a client is in fact in bankruptcy in the Southern District of Georgia. That should make that aspect of it a lot easier to be handled in the future.

Anyway, we regret these difficulties that occurred in the past. We've taken – Mr. Eichholz has taken very broad steps to make sure they do not reoccur in the future, and that is what we're hoping for.

With respect to the matters of his former associate that were in the original response, and that we have somewhat amended, and we have not put any additional amendment on the part of the Stanley case, but in all of those particular cases, we have determined that his – that

those petitions had been prepared in his office by Ms. Barnett, and that she had put them in the office of Ms. Hamilton, but not stating that –

JUDGE DAVIS: I hate to interrupt your train of thought. But so the record is clear, it is in the pleadings, but let's identify who we're talking about, Ms. Barnett and Ms. Hamilton.

Ms. Barnett is a paraprofessional –

MR. BUSHBAUM: Correct.

JUDGE DAVIS: -- who was working in his office at some relevant time.

MR. BUSHBAUM: That's correct, Your Honor.

JUDGE DAVIS: And Ms. Hamilton was an associate. She is a member of the Bar and an associate in his office.

MR. BUSHBAUM: Correct.

JUDGE DAVIS: For part of the time in question.

MR. BUSHBAUM: She is the one who filed the motion to intervene.

JUDGE DAVIS: Okay. Let's just make sure we identify everybody.

MR. BUSHBAUM: Yes, sir. Okay.

JUDGE DAVIS: So that we are all clear.

MR. BUSHBAUM: And we would like the Court to understand, and Ms. Hamilton to understand, that we have now found out in the interview with Ms. Barnett that she did not

necessarily know whether Ms. Hamilton had reviewed those things. She had put them in Ms. Hamilton's office, and then she had taken – Ms. Barnett had taken them back. And Ms. Barnett is the one who prepared them to be filed in the Court.

And to the best of our knowledge, Ms. Hamilton was not involved in it. She perhaps should have been, but she was not. So, whether she should have been or not, that was really irrelevant to this proceeding, Your Honor. That would have been the question of whether she was doing what Mr. Eichholz had expected her to do. But that is not really not the issue. The issue on that aspect is that Ms. Barnett is the one who did those things, including those various errors in the amounts of money shown on some of those, the discrepancy of those things. But there is no knowledge whatsoever where Ms. Hamilton even reviewed those before they were filed, muchless that she not be the one to sign them and file them.

So, from that aspect of it, I mean, that is something. And Ms. Barnett is no longer employed by Mr. Eichholz. She has been replaced by somebody else in the office. And the she was replaced by Ms. Dorsey, who is outside. And if we need to get to that point, we will be able to explain the procedures that she has been instructed to follow and has been following since this thing occurred

And that is the sort of thing, Your Honor, we were talking about. And as I think I mentioned, we do have the settlement checks for the Bacon and the Forsythe cases if they and their counsel are, you know, going to accept those. Mr. Eichholz is ready to endorse them over and turn them over.

But basically, as I say, we regret the problems which have occurred. And we believe that ever effort has been made now to handle things in a manner to prevent those things happening in the future. And we hope that the Court would consider it on that basis, Your Honor.

JUDGE DALIS: Mr. Buschbaum, let me, just so you don't get at the end of the hearing hear my concerns about this and have had an opportunity to address it.

I have great concerns regarding the allegations that it appears have been made by several, a couple of these debtors that they never approved the settlements initially that were made. But my biggest concern involving Mr. Eichholz and his office is the fact that he had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed.

That is my big concern as it pertains to the integrity of this system, within the bankruptcy system is that pleadings that are filed by counsel have been read,

reviewed, and approved, and signed by counsel, appear to be, have actually – he has actually signed them. And I think with the exception of this allegation that there may have been settlements made without the approval of clients, the rest of all of this in terms of misrepresentation to the Court, of sloppy pleadings, all of those things stem from the fact that he allowed – it appears from what I am reading now in your supplemental response – someone not a lawyer, a secretary basically, to sign, to create a document, sign it and file it without him ever having seen or reviewed it.

MR. BUSHBAUM: Well, Your Honor –

JUDGE DALIS: That is my concern, so, that is what we need – from my standpoint, that is what I want the evidence to address, and what is he doing now that is different, and what has he been doing along the way that changes that office procedure, because to me, that is a clear violation of State Bar standard obviously for a lawyer do that. And it seemed to me from what I gather from this, that was the way things were done in the office. That was the procedure in the office that pleadings were drafted and filed with what appears to be Mr. Eichholz's signature, and he didn't sign them. He didn't even read it.

MR. BUSHBAUM: Your Honor, I wonder if you have been listening to some of the conversations that I had with

Mr. Eichholz, because this was something that I expressed a great deal of concern about in discussing it with him. And as I understand it, he was not aware that these things had been signed by someone else. But in any even, as I said, I discussed this with Mr. Eichholz, and he would absolutely make certain that anything is filed in any court on his behalf, that he will have, number one, read it, and studied it, and then he would be the one to sign it. Otherwise, it would not be filed. And that is absolutely something that will not recur.

He regrets, and we do regret, that had happened. But his office was extremely busy, and he was simply not personally aware that those things had occurred. But he is going to make certain, and his staff understands also, that anything that needs to be filed in any court that he is the one who needs to read it, and he is the one that needs to sign it before it will be filed. And that is the one that has now been done since, as I mentioned, since November. It has happened on that basis, and will continue to be happened on that way.

I happen to agree with Your Honor. That was something that was of concern. And as I mentioned, Mr. Eichholz was not certain, was unaware that it happened in that manner, but he is making certain that it will no recur.

JUDGE DAVIS: Thank you. Is there counsel for any of

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

In the matter of:

LINDA J. BACON
Chapter 13 Case

Number 03-44067

Debtor

JAMES L. FORSYTHE
Chapter 13 Case
JANICE F. FORSYTHE
Number 04-42195

Debtors

SABRINA N. STANLEY
Chapter 7 Case

Number 05-41600

Debtor

RESPONSE OF BENJAMIN S. EICHHOLZ
TO MEMORANDUM AND ORDER

NOW COMES, BENJAMIN S. EICHHOLZ, and files his Response to the Memorandum and Order dated December 2, 2005 in connection with the above-referenced matters.

Linda J. Bacon

In the Findings of Fact in the Linda J. Bacon matter the Court noted that it did not enter an Order on the Application for Approval of Employment submitted by me nor on the Motion to Settle Ms. Bacon's Personal Injury Case but scheduled the matter for a hearing. There is nothing unusual about this because this has become the norm for the handling of the Application for Approval of Attorney's Employment as well as the Motion to Settle a Personal Injury Claim simultaneously in recent years.

The Court is correct in stating that I was not present at the hearing on November 2nd, 2005; however I had made arrangements with another member of the bar, Abda Quillian, to stand in for me at this hearing. My former associate, L. Nicole Hamilton, who had previously handled these matters for me was no longer associated with my firm as of November 1, 2005. I was personally unable to attend the hearing because of the funeral of a prominent member of the Jewish community and the mother of a very good friend of mine, Janet Lipsitz, which was held that same morning. The Court had been previously informed of this conflict in my letter dated November 10, 2005.

In view of the fact that Ms. Hamilton was no longer employed by my firm there was no other member of my firm who was able to attend said hearing and therefore I sought the help of a very able attorney who has 21 years of experience practicing law.

I informed Cindy Barnette of my office to make sure Ms. Quillian had all of the necessary paperwork and information to handle this hearing but she apparently only sent her copies of the Motions before the Court and not a copy of the demand package, which included the medical records and accident report. I have since learned that Ms. Barnette followed this same procedure with another attorney who was handling the exact same type of matter for my firm

and my appointment and the approval of the settlement were both approved without any difficulty.

The claim of Ms. Bacon could have very easily been handled by simply asking Ms. Bacon the facts surrounding her claim as is often done with debtors at these hearings. It just so happens that this was a very simple auto accident that occurred while Ms. Bacon was in the drive-thru at a McDonald's restaurant when her car was lightly rear-ended resulting in little property damage and very little subsequent medical treatment with only a few visits to a chiropractor and no out-of-pocket medical expenses because there was $5,000.00 medical payments coverage available to Ms. Bacon.

The fact that we were able to achieve a settlement of $1,000.00 over and above the medicals that had already been paid would lead one to conclude this was a very straightforward auto accident claim and not one that would require a great deal of explanation and knowledge by an experienced attorney such as Ms. Quillian.

If the Court deemed to know more about the claim, the Court could have merely instructed Ms. Quillian to meet with Ms. Bacon outside of the Courtroom to go over this matter in further detail and to report her findings to the Court. If Ms. Quillian has deemed it necessary to find out more about Ms. Bacon's claim she could have simply spoken to Ms. Bacon prior to the actual hearing since there is always a great deal of down time waiting for these types of petitions to be called at the typical Bankruptcy docket hearings.

Instead, the Court seemed to be more focused on the fact that I personally was not in attendance and basically took it upon itself to literally scare Ms. Quillian off from handling what was an extremely routine matter that all parties were in total agreement with.

Not only was Ms. Quillian basically encouraged not to continue her appearance on behalf of Ms. Bacon, she was also basically encouraged not to make an appearance on the

second matter that is the subject of the Memorandum and Order as well.

The Court states that the Motion to Settle stated that the Court had entered an Order authorizing my employment to pursue the debtor's claim even though this was not correct. Of course, the Court had not entered such an order because the Application for Approval of Employment would have been presented to the Court first before the Court would have even considered the Motion to Settle the Personal Injury Claim of Ms. Bacon. Since the Court did not approve my employment to represent Ms. Bacon in connection with this matter, then the Motion to Settle the Personal Injury Claim never would have been presented to the Court and become ripe for a hearing because the previous Application and Order had not been signed and approved.

Even though the Motion correctly sets forth the settlement amount, the amount due to me for my representation and the net amount due to the debtor the Order obviously contained two clerical errors which could have easily been corrected either by Ms. Quillian if this was pointed out to her or by the Court itself. Clearly these erroneous amounts were amounts contained in a prior Order that our paralegal, Cindy Barnette, utilized for the preparation of this form. It should be further pointed out, however, the correct net amount due to Ms. Bacon was contained in the Order below these figures making clear the intent of all parties concerned.

It is my understanding that at not time did the Court ask Ms. Quillian to explain these discrepancies which obviously were the result of a clerical mistake by my paralegal and which obviously could have been clarified by Ms. Bacon if that was the desire of the Court.

These types of clerical mistakes do unfortunately occur in the day-to-day activities of a busy law office and should have been picked up by the attorney that reviewed this petition, L. Nicole Hamilton, prior to its submission to

the Court. It should be noted that this Application and Motion were prepared by Cindy Barnette, an experienced paralegal of over 5 years, and personally reviewed by my former associate, L. Nicole Hamilton, who affixed my signature to the documents much as she had done in numerous matters that she has had approved by this Court in the past largely without incident.

My file is quite clearly documented and the following terms of the settlement should be clarified and noted. At no time did I ever call Ms. Bacon who is now know as Ms. Peters and tell her that I had obtained a settlement offer in the amount of $2,800.00 which she authorized me to consummate. The only settlement offer that was ever made in this case was $1,000.00 and my file is clearly noted accordingly. I am attaching a copy of the first page of my demand package with clearly reflects midway down the right side that the first and only offer to settle this case was in the amount of $1,000.00 (Exhibit "A"). It should be further noted that the insurance company's first response was to deny the claim, which is also noted under the $1,000.00 figure on the right side of the page.

In the upper right hand corner of the page my authority is reflected which was received on June 10, 2005 at 12:30 p.m. from Ms. Peters. I have no idea where Ms. Peters got any of these other mentioned figures from but they are inaccurate and untrue. She was never told that the settlement amount had been "reduced to $1,500.00 and ultimately to $1,000.00". I would submit to the Court that it would be very difficult to conduct negotiations with a client when an insurance company was reducing their offer instead of increasing their offer during negotiations.

Obviously Ms. Peters would have no idea why our pleadings would have suggested a settlement amount that was as much as $25,000.00 because as explained above that was a clerical mistake made by our paralegal, Cindy

Barnette, and not picked up by the reviewing attorney, L. Nicole Hamilton, before presentation to the Court.

James L. Forsythe
Janice F. Forsythe

The Court points out once again that no Order authorizing my employment was even entered and once again this is simply a part of the form that is used in the simultaneous filing of an Application for Approval of Employment of Attorney and a Motion to Settle a Personal Injury Claim. In view of the fact that the Application for Approval for my Employment was never acted upon then, of course, the Motion for Approval of the personal injury claim would never have been ripe for hearing.

Whereas it is true that Ms. Quillian did apparently make the announcement that she wished to be excused from making an appearance, it is my information that she did so based upon the fact that she did not previously discuss this matter in any detail with Mrs. Forsythe and therefore was not fully prepared to discuss the facts surrounding Mrs. Forsythe's case. Once again if the Court would have merely inquired of Ms. Quillian and tried to elicit this information, the Court could have simply instructed her to receive whatever information was necessary either by fax from my office or by discussing the matter in detail with Mrs. Forsythe. For whatever reason this did not occur in the Forsythe case nor did it occur in the Bacon case.

Since the Forsythe case was scheduled for a hearing on the same date as the Bacon case my reason for not personally attending this hearing is the same one set forth in my discussion of the Bacon case. In the Motion setting forth the distribution of the funds in the Forsythe matter it correctly set forth the settlement amount of $7,500.00, the proposed amount of $3,158.73 which would have been due to me for my representation of Ms. Forsythe as well as the

correct amount of the net proceeds to be the property of the debtor totaling $3,932.35.

However, once again my paralegal, Cindy Barnette made a clerical mistake in transposing one of these figures in the Order Approving the Settlement of Mrs. Forsythe's personal injury claim and stated that I would be receiving $3,932.35 instead of the correct figure of $3,158.73. The Order does, however, correctly show the net amount that Mrs. Forsythe was to receive in the amount of $3,932.35 and it reflected that this amount would be paid to the Chapter 13 Trustee and held pending completion of the plan.

Both the Bacon and Forsythe forms were prepared either on the same date or around the same date and were among the first ones prepared by Mrs. Barnette. Previously Ms. Hamilton prepared the forms herself and Mrs. Barnette was simply trying to help Ms. Hamilton. Also, once again Ms. Hamilton reviewed these forms before their presentment to the Court and apparently missed the one mistake made by Mrs. Barnette in the preparation of the Forsythe Order. Also once again I had no personal knowledge of either the Bacon or Forsythe forms prior to their submission to the Court for approval, as this was something that Ms. Hamilton performed on a routine basis for our office over the past couple of years.

In regards to the merits of Mrs. Forsythe's claim it is unfortunate that debtors' Bankruptcy Counsel indicated to the Court that the debtor had incurred over $5,000.00 in "hard" medical costs. In fact Mrs. Forsythe according to our records accumulated $4,034.82 in medical costs and had all of her medical bills paid with the exception of only $408.92, which was reflected in the petition submitted to the Court.

If Mrs. Forsythe has been questioned at the hearing she could have explained to the Court that she received conservative medical treatment and that she had concluded her medical treatment 7 or 8 months prior to this hearing. A settlement of $7,500.00 for largely soft tissue injuries with

only a small amount of medical bills remaining to be paid is well within the reasonable range of the types of settlement routinely approved by the Court.

The Court refers to the opinion of Bankruptcy counsel in regards to the valuation of this personal injury claim. I would submit to the Court that based upon my 29 years experience handling personal injury claims on behalf of claimants throughout the State of Georgia it is my firm opinion and belief that this is a reasonable and fair settlement of the claim of Mrs. Forsythe's claim.

It should be further pointed out that the original offer of $6,000.00 was approved and authorized on August 8, 2005 at 3:45 p.m. It was only through further negotiations that I was able to increase this amount to the final settlement figure of $7,500.00. It is not unusual whatsoever for a personal injury claimant to feel that a proposed settlement amount was "too low" as contained in the Court's Memorandum and Order. It is important to point out that the Court noted that Mrs. Forsythe stated that she was, in essence, ready to conclude this matter and move on with her life, however. It is completely untrue that she had not authorized me to conclude the settlement at the agreed-upon figure of $6,000.00. I may have in fact stated to Mrs. Forsythe that I would try to settle her case for as much as $10,000.00, but I clearing received her authority to setter her claim for $6,000.00 as once again shown on the first page of Mrs. Forsythe's settlement package which I am, attaching hereto as Exhibit "B". If in fact Mrs. Forsythe stated that she did not authorized this settlement then she has in fact completely misled the Court.

It may very well be true that my office did not notify the Forsythes to inform them of the final settlement amount of $7,500.00. My office staff and I do not document whether or not a follow-up call is made to the client informing them of the final settlement amount as long as the final settlement amount is in excess of the authorized settlement figure

agreed to by the client. In many cases such a call is made but not in every case.

As a result of the assertion by and apparently concern of the Forsythes that they did not receive a final call informing them of the final settlement amount, I have now changed my office policy to ensure that an additional follow-up call is made to each of our clients who are in bankruptcy informing them of the final settlement figure achieved. The reason for this is that most settlements are concluded within just a few days of the settlement being reached by telephone. However, this is not the case when a client is also a debtor in a Bankruptcy proceeding. In order to ensure that this does not occur in the future I have changed my office policy accordingly.

As a result of the Bankruptcy hearing on November 2, 2005 Mrs. Forsythe delivered a termination letter to my office on November 2, 2005 which was acknowledged by Mrs. Forsythe's case manager, Sarah Osborne, that same day. Mrs. Forsythe received a copy of her file on November 4, 2005 and has been free to seek other counsel since that time.

The Trustee's office did not oppose the Authorization of Employment of me to represent Mrs. Forsythe but did request as they have routinely done in the past that my fee be reduced from 40% to 33 1/3%. This has always been agreed to by me in the past. In fact usually our forms contain the 33 1/3% figure but since this was one of Mrs. Barnette's first forms prepared she obviously wasn't aware of this policy of the Trustee's Office.

Sabrina N. Stanley

Once again the court points out that no such Order of Appointment had ever been sought by Counsel or entered by the Court. I did file an Application for Appointment as well as a Motion to Approve the Settlement, which was mailed to the court on August 19, 2005. In this matter there was

obviously another clerical error when it had two different settlement amounts. Once again this pleading was reviewed by a former associate of mine, L. Nicole Hamilton, who approved the form and affixed my signature to said form in accordance with the office procedure that we had been following for quite some time prior to that time.

A complete and thorough review of my file shows that there was no Notice of the hearing that the Court set for October 11, 2005 in my file.

The following facts are relevant and are the actual facts that transpired in connection with the settlement of this claim.

On August 4, 2005 we submitted our original demand letter to Metropolitan Property and Casualty Insurance Company for the settlement of Mrs. Stanley's claim. On August 16, 2005 we received an offer for $6,000.00 which was then conveyed to Mrs. Stanley. On August 16, 2005 at approximately 5:00 p.m. Mrs. Stanley authorized the settlement of her claim in the proposed amount of $6,000.00 (Exhibit "C"). I then contacted the insurance company and was able to get them to increase the amount of the settlement to $6,519.00.

Subsequent to Mrs. Stanley's case being settled on September 2, 2005 she sent me a letter attempting to terminate my services. On September 6, 2005 Mrs. Stanley and her husband came into my office to review her file and after the review she left my office with no further instructions whatsoever.

Then, unannounced on September 23, 2005 Mr. and Mrs. Stanley both appeared in my office and informed both Cindy Barnette and me that they were no longer in Bankruptcy and they wanted to conclude their settlement. We immediately contacted Mrs. Stanley's Bankruptcy Attorney's office and were informed by them that the Stanley's Bankruptcy had been dismissed and they were not long in Bankruptcy. We also clarified that we were going to

disburse the settlement funds to the Stanleys and that we were going to remit the net settlement proceeds to them as well.

Upon completion of this telephone conversation with Mrs. Stanley's Bankruptcy Attorney's office we proceeded to execute all of the settlement documents including the settlement check, the release and the settlement statement. We then disbursed the net settlement proceeds to Mr. and Mrs. Stanley on this same day all in accordance with the information that was presented to us both by Mr. and Mrs. Stanley on that date and confirmed by her Attorney's office.

I would like to request that the Court make a thorough review of the blue sheet which contains the Court's notes of what actually transpired at the hearing on the matter to determine what misrepresentations may have been made by Mrs. Stanley to the Court on October 11, 2005.

When the debtor stated that she had no communication with my office except that she had been informed that the case had been settled she obviously misled the Court because we had in fact personally met with Mrs. Stanley and concluded her settlement with her and her husband some 18 days prior to this on September 23, 2005. Once again it is not unusual for a personal injury client to state that she did not think that her settlement was high enough. It is very bothersome to note that Mrs. Stanley stated to the Court that she wished to find another attorney at that time, particularly in light of the fact that she and her husband had concluded their settlement and received their entire settlement proceeds totaling $2,674.25 some 18 days prior to this time. It should also be noted that we were able to lower Dr. Culbreth's payment by $750.00 in order to net her more money.

One can only imagine why in open Court Mrs. Stanley apparently made the misrepresentations that she made but somehow after the Court hearing she obviously informed her Attorney that she had met with me at my office

and that we had already concluded the settlement and distributed the settlement funds.

Whereas it is correct that I have never been appointed by the Court to represent Mrs. Stanley in connection with this matter it is for the above-stated reasons that this matter was concluded all with the knowledge and consent of Mr. and Mrs. Stanley and based completely on the false statements made by Mr. and Mrs. Stanley concerning the fact that they were no longer in Bankruptcy.

It was not until this Memorandum and Order that I received any communication from the Court directing me to refund any portion of my fee or to pay it over to the Bankruptcy Trustee even though the Court was notified some time ago that these funds had been disbursed.

The Court refers to the In Re: Glover case which seemed to mark a drastic change in the manner in which Attorney's Employment Application and subsequent Motion for Approval of Settlements were to be handled by the Court. Prior to that case and for the past approximately 20 years or so I had routinely filed Applications for Employment and Motions for Approval of Settlement in the Southern District of Georgia Bankruptcy Court without making an appearance at the hearing. The Court is correct in its statement that I failed to appear at the the scheduled hearing on December 18, 2002 and again on February 13, 2003. I did not realize that I needed to appear based on the Court's prior practices. Once it became clear to me that there was a change in the Court's policy for approval of settlements I did, however attend the April 17, 2003 hearing.

At the April 17, 2003 hearing I made it perfectly clear to the Court that no funds had actually been distributed prior to that time even though some of the settlement documents had been executed in anticipation of the routine approval that was going to be received at the December 18, 2002 hearing.

It is my firm opinion and belief that the manner by which the Court approved the employment of attorneys had the subsequent settlements prior to December 18, 2002 was drastically different that what was being set forth in the Glover hearing and what I understood the new manner of approval was going to be subsequent to the Glover matter.

The changes in our office policies and procedure reflected in the middle of page 11 of the Memorandum and Order resulted in the policy that no longer did we have clients execute their settlement statement until such time as we had been appointed to represent the client and their settlement had been approved by the Bankruptcy Court. This simple change has been instituted for the past 3 years and to the best of my knowledge without any further incident.

The Court then discusses the In Re: Dudley matter. I had an Attorney attend the Bankruptcy hearing on my behalf to seek approval of Ms. Dudley's personal injury settlement. According to the Court's Memorandum and Order the Attorney did have a general understanding of the nature of the automobile collision that the debtor had been involved in, the medical expenses that had been incurred and the total amount of the settlement of $11,160.00.

I am bewildered by what other information the Attorney needed to support or justify the fee that was being sought in the amount of 33 1/3% in light of the fact that a 33 1/3% is routinely granted in cases such as these and the Court has approved such fees in this amount routinely for a good number of years. The Court is well familiar with my experience and abilities as a personal injury lawyer since the Court has routinely approved my employment and Attorneys fees requests for the past 29 years or so of my extensive personal injury practice.

According to the Court Ms. Dudley was satisfied with the settlement amount of her claim and that seems that it should be sufficient for the Court's approval of the

settlement. How much actual contact Ms. Dudley had with me and whether or not I returned her messages don't seem to be relevant factors considering whether or not an Attorney's fee is reasonable or not under the circumstances. I would like to point out to the Court that it is regular policy of mine to return all of my telephone message on a daily basis. I do not leave my office until all of my telephone messages are received, however it should be pointed out I have a full time staff of 14 employees who regularly handle routine telephone calls from clients in my stead if they are a matter that may easily be administratively handled by support staff.

The Court makes the point that one of my former associates, Constance Thomas, did an effective job of explaining to the Court the facts surrounding Ms. Dudley's claim but goes to state that even in light of this, my fee was reduced from $4,400.00 to $1,500.00.

At the bottom of page 13 of the Memorandum and Order the Court correctly notes that since the Court's rulings in Glover, Fuller, and Dudley I have responded by improving my office procedures and/or assuring that counsel regularly associated with my firm made timely appearance at matters scheduled before the Court. It goes without saying that if Ms. Hamilton, who was the attorney largely responsible for these changes and continued Court appearances, were employed by my firm subsequent to November 1, 2005 then she, of course, would have been scheduled to attend both the Linda J. Bacon and James and Janice Forsythe matters. However since she left my firm at the end of October this obviously was not possible.

In light of the sudden emergency of the funeral of the mother of one of my close friends I do not feel that it is out of the ordinary or inappropriate to have another attorney fill in for me for what should be a relatively simple matter of explaining a personal injury settlement and what steps were taken to achieve same. It is unfortunate that Ms. Quillian was not provided with all of the necessary information to

explain the surrounding circumstances and facts to the Court and I will take the responsibility of the omission made by our paralegal, Cindy Barnette, and Ms. Quillian.

The improvements instituted by my office during the past couple of years have not been merely "transitory". In fact I personally appeared at the most recent hearing of one of my Applications for Employment and Approval of a Personal Injury Settlement on December 7, 2005. I would like to point out that at that hearing which lasted 3 hours I was completely questioned for the manner in which my office handles our personal injury business and virtually every aspect of my personal injury practice was looked into by the Bankruptcy Judge at that time. I would submit to the Court that a detailed 3-hour hearing concerning the intricacies of what has become one of the State's leading personal injury law practices is not the true intent of a hearings such as this. I patiently waited in Court for 1 ½ hours before the lengthy 3-hour hearing took pace and I can't imagine any reasonable person would feel that this type of extended hearing is appropriate or necessary to approve my employment in a case that had long since been settled, that my appointment had been approved by the Trustee's office, and was merely being held to determine the reasonableness of my 33 1/3% fee on a case that settled for a total amount of $4,000.00.

During my most recent hearing and on page 14 of the Memorandum and Order it has become glaringly apparent to me that the Court's rules for Appointment of Employment are going to be strictly enforced requiring appointment at the beginning of the handling of a personally injury claim rather than receiving the appointment simultaneously with the approval of the settlement. I would submit to the Court that this is a dramatic change in the way that these matter have been held for the better part of the past 25 years or so. In fact the Staff Attorney at the hearing, Andraya Mimms, as well as the debtor's Attorney, Judson Hill, at the most recent

hearing, informed the Court that approximately one-half of all Applications and settlements are handled in the exact same manner as I had handled mine in the past.

As a result of this apparently change in the Courts practical procedures I immediately instructed my entire staff to review all our pending personal injury claims in order to request the Courts appointment early on in the course of my representation of clients who are in Bankruptcy at the time. At this time we have identified 12 pending clients who are presently in Bankruptcy and we are in the process of preparing Approvals for the Employment of our firm in all 12 of those cases.

There also seems to be some concern that when a case is settled that it should be made clear to the insurance company that even though the client has given authority and even thought I have conveyed said authority to the insurance company and all parties have agreed on a settlement amount that I should make it clear to said insurance company representative that the client is in Bankruptcy and the settlement will require formal approval by the Bankruptcy Court.

I submit to the Court that my staff and I will make a conscience effort to have all claims of clients who are in Bankruptcy appropriately noted and I will make my absolute best effort to inform insurance company representatives of the required approval in these types of cases that I handle in the future.

On page 14 of the Memorandum and Order the Court eloquently sets forth the policy of the Court granting retroactive approval to counsel to represent debtors in the Southern District of Georgia. In light of what has been conveyed to me as perhaps a change in this relatively informal standard, I have instituted the above-referenced changes in my office's policies and procedures concerning the handling of claims for clients who are in bankruptcy.

At the present time I do not employ an associate that is licensed to practice in the Southern District of Bankruptcy Court so I will personally attend all future Bankruptcy Approval hearings in the future unless an emergency or planned vacation is scheduled. In those rare instances I will have competent legal counsel who is fully versed in the facts of the particular Bankruptcy case present at the hearing.

I am truly sorry for the errors contained in the pleadings in the Bacon and Forsythe matters. My office has filed numerous pleadings in the cases that I have handled in front of the Court without any clerical errors or other mistakes. There is no excuse for any pleadings to not be perfect; however mistakes are sometimes made and the mistakes in the Bacon and Forsythe matters should clearly had been caught by the reviewing attorney, L. Nicole Hamilton.

I would like to make it extremely clear to the Court that in all future cases such as these whether or not I have an associate handling the approval of the settlement I will personally review all Applications for Employment and all Motions for Approval of Settlements before they are submitted to the Court whether or not I or any other attorney in my office will handle the Approval of same.

On page 15 of the Court's Memorandum and Order the Court points out once again that the form of the Motion for Approval of a Settlement used by my office recites that I have already been approved to serve as counsel to the debtors in their personal injury cases. Obviously the Approval for Employment must be read and approved by the Court first before getting to the Motion for Approval of the Settlement. I do not feel that a form that is to be taken up second by the Court and presupposes an entry of an order continued in the first form is misleading in any way whatsoever. If the Court is going to grant retroactive approval to counsel who represents debtors under certain circumstances it is clearly understandable that the petitions

would be handled in logical sequence at the respective Court hearing. I have not reviewed other Attorneys forms but I feel that my forms are appropriate in view of the fact that both forms were being handled in logical sequence at the respective Bankruptcy hearing. If the Court feels that there is another form that may make this somewhat clearer then obviously I would have no objection to incorporating the preferred form into my office's regular approval forms.

It is entirely incorrect that I have ever settled any case before the Bankruptcy Court without obtaining my client's approval. All of my files are well-documented and not only do I receive my client's approval but for the past 12 – 18 months or so I routinely have had a second member of my staff witness and acknowledge the approval that I receive from my clients. In fact I have a paralegal that gets my clients on the phone for me for this purpose and she stands in my presence during the entire conversation with my clients in which I seek their approval for a settlement.

The Court once again points out that I regularly have substitute counsel stand in for me and this is, in fact, not correct. The only time that I am aware in the last 12 – 18 months or so that I have had substitute counsel stand in for me was in the Bacon and Forsythe matters when I was unfortunately unable to attend the hearing due to the funeral discussed above. I might add that I do recall one other instance recently that the hearing was out of town and I had another attorney handle the hearing for me with another Judge. This hearing was routinely handled without any incident whatsoever and as it turns out the Attorney was not asked to discuss anything about the case other than what was contained in the Application and Petition. It is my information that this hearing was uneventful and not only did I receive retroactive approval of my employment as an Attorney but the settlement was approved along with my fee of 33 1/3% without any incident or discussion. Apparently there is a great deal of difference between the manner in

which different Judges handle these hearings. I am not suggesting that one manner is better than the other; however I am suggesting that the manner of conducting these hearing is glaringly different from Judge to Judge and has also evolved over the past 3 years or so from a rather perfunctory, informal granting of Applications for Employment and Motions for Approval for Personal Injury Settlements to a much more rigid, formal process that seems to be the present policy for at least some of the Judges in the Southern District of Bankruptcy Court. In light of these changes, I obviously have changed my office procedure so that I will be personally present at virtually all, if not all, of these hearings in the future, subject to health or family vacations or other emergences such as a funeral.

In view of the change in my office's procedure I no longer will regularly request the latitude of the Court in granting retroactive approval of my employment to represent debtors in the Court as reflected on the bottom of page 16. I will seek approval soon after I am made aware that one of our clients is in bankruptcy.

In regards to the case of Linda J. Bacon and the case of James L. and Janice Forsythe no disbursements of any monies has been made. I am in receipt of the settlement checks in both cases but no monies have been disbursed in either of these cases. In regards to the Stanley matter this settlement was concluded on September 23, 2005 and I am enclosing a copy of the settlement statements (Exhibit "D"), which reflects the terms of the settlement as well as the disbursement of all settlement proceeds.

I am herewith remitting the sum of $2,274.75 that was received by me in connection with the Sabrina Stanley matter consisting of $2,173.00 in attorneys fee and $101.75 in costs in accordance with the order of the Court.

Respectfully submitted this 15th day of December, 2005.

THE LAW OFFICE OF BENJAMIN SHEFTALL EICHHOLZ, P.C.

By: /s/ Benjamin S. Eichholz
Georgia State Bar No. 24235

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Filed December 5, 2005, 1:18 p.m.

IN THE UNITED STATES BANKRUPTCY COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

LINDA J. BACON
Chapter 13 Case

Number 03-44067

Debtor

JAMES L. FORSYTHE
Chapter 13 Case
JANICE F. FORSYTHE
Number 04-42195

Debtors

SABRINA N. STANLEY
Chapter 7 Case

Number 05-41600

Debtor

MEMORANDUM AND ORDER

FINDINGS OF FACT

Linda J. Bacon

Debtor's case was filed December 17, 2003. On August 12, 2005, a Motion to Settle Personal Injury Claim was filed by Benjamin S. Eichholz, attorney for Ms. Bacon, now known as Linda Peters. On the same date, Mr. Eichholz filed an Application for Approval of his employment as her personal injury counsel. The Court did not enter an Order on that application nor on the motion to settle but scheduled the matter for a hearing on November 2, 2005. When the case was called Ms. Peters was present, her bankruptcy counsel Barbara Braziel was present as well as the Chapter 13 Trustee, however, Mr. Eichholz did not appear. An announcement was made by a member of the Bar that she was appearing as a courtesy to another attorney, not a member of Mr. Eichholz's firm, who had originally agreed to "stand in" as substitute counsel for Mr. Eichholz. The Court questioned substitute counsel to determine her knowledge of the merits of the motion before the Court, and she stated forthrightly that she knew nothing about the merits of the case, but had simply been asked to "stand in" at the hearing, and was doing so as a professional courtesy.

The Motion to Settle states "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 23, ¶ 1). The record reveals that the Court has entered no such Order. The Motion further sets forth that the settlement amount is $1,000.00, $437.50 of which will be due to Benjamin S. Eichholz, and the net of $562.50 to be paid to the Debtor. The Order that was submitted to the Court for approval, however, states "the Motion to Settle Personal Injury Claim is hereby granted that [sic] of LINDA PETER'S settlement of $25,000.00, $8,595.91 will be due to Benjamin S. Eichholz..."

Because Mr. Eichholz's substitute counsel had no knowledge of the case and obviously could not

explain the discrepancies in Mr. Eichholz's pleadings as set forth above, the Court questioned the Debtor. She stated that Mr. Eichholz had called her on one occasion after she hired him and told her that he had obtained a settlement offer in the amount of $2,800.00, which she authorized him to consummate. She later received notification that the amount had been reduced to $1,500.00 and ultimately to $1,000.00. She was provided no explanation as to why the $2,800.00 settlement which she authorized had been reduced, and she gave Mr. Eichholz no authority to settle the case for any lesser amount. She had no idea why any pleadings presented to the Court would have suggested that her settlement was as much as $25,000.00, and at the conclusion of the hearing I took the matter under advisement. However, because Ms. Bacon had not authorized the settlement amount which was being proffered, because Mr. Eichholz had never been approved to represent her, and because he failed to appear at the hearing, I stated that I would not approve his employment and would not approve this settlement. I directed her bankruptcy counsel to confer with her at a later time and inform the Court whether they wished the settlement motion to be placed back on the Court's calendar.

James L. Forsythe
Janice F. Forsythe

Debtor's case was filed July 23, 2004. On August 12, 2005, Benjamin S. Eichholz filed an application seeking the employment of Benjamin S. Eichholz, as personal injury counsel for Debtor, Janice F. Forsythe. On the same date Mr. Eichholz filed a Motion to Settle Personal Injury Claim. The Motion stated: "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 36, ¶ 1). No such Order was ever entered by the Court. The Motion was set for a hearing on November 2, 2005. When the case was

called for h[illegible]g, Mr. Eichholz did not appear. Substitute counsel who had made an appearance in the Bacon case, which was called immediately prior to the Forsythe case on the Court's calendar that day and which is referenced earlier in this Order, announced that she wished to be excused from making an appearance in this case. The Court granted that request, after being informed that, similar to the previous case, substitute counsel had no knowledge of the merits of the application or the settlement and had only been contacted the night before the hearing and asked to make the "stand in" appearance.

This Motion sought approval of a settlement of $7,500.00 with $3,158.73 payable to Mr. Eichholz and a net of $3,932.35 payable to the Debtor. However, the proposed order approving the settlement recited that $3,932.35 would be due to Mr. Eichholz and that $3,932.35 would be paid to the Chapter 13 Trustee pending completion of the plan. Because there was no appearance by Mr. Eichholz, Debtors' bankruptcy counsel was not in a position to recommend the settlement, but offered the observation that the Debtor had incurred over $5,000.00 in "hard" medical costs, had had numerous x-rays and an MRI and had been referred to Dr. Roy Baker, a noted neurosurgeon in Savannah. Dr. Baker too a conservative course of treatment and recommended physical therapy to the Debtor, and at this point, the Debtor appears to have recovered from the effects of her injuries. However, bankruptcy counsel made the observation, without knowing more about the case, that with medicals in the $5,000.00 range, with the type of tests required, and the referral to a neurosurgeon, the $7,500.00 settlement did not seem adequate in comparison to counsel's experience in handling similar personal injury claims.

The Court conducted an inquiry of the Debtor, Janice Forsythe, in injured plaintiff, and her

husband, the co-debtor, James Forsythe, and learned the following: The Debtor/Wife seemed more or less resigned to accepting the settlement because her personal injury counsel Mr. Eichholz had urged her to accept it, and because she is, in essence, ready to conclude the mater and move on with her life. However, she stated that she proffered the settlement amount was "too low," and more importantly, that she had not authorized Mr. Eichholz to conclude the settlement. According her to, he had indicated that he would attempt to settle the case for $10,000.00, but had not sought her permission or authority to settle in any amount other than earlier offer of $6,000.00, which she refused.

Neither Mr. nor Mrs. Forsythe ever received any notification from Mr. Eichholz that the case had been settled in any amount, until they received a notice from the Court advising them of the hearing which was scheduled upon Mr. Eichholz's Motion to settle for $7,500.00. Mr. Forsythe called Mr. Eichholz's office when he received the notice and questioned why the case had been settled and who had authorized it. Mr. Eichholz's reply was "you ought to be thanking me for getting you this much money." Neither Debtor nor her husband authorized Mr. Eichholz to enter a settlement.

At the conclusion of the hearing, I ruled that Mr. Eichholz would not be appointed to serve as counsel in this case and that the settlement would not approved because the clients had not authorized the settlement, Mr. Eichholz had not appeared, and it did not appear that the settlement was in the best interest of the Debtors. By subsequent order I required Mr. Eichholz to turn over to the Debtor her file regarding the personal injury claim if she exercised her option to seek other representation.

Sabrina N. Stanley

Debtor filed a Chapter 7 case on June 22, 2005. On August 22, 2005, a Motion to Settle Personal Injury Claim (the "Motion") was filed on her behalf by Benjamin S. Eichholz, attorney for Ms. Stanley. The Motion asserted that "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 11, paragraph 1.) No such order of appointment had ever been sought by counsel or entered by the Court. The Motion was also inconsistent or misleading when it asserted that the settlement amount was $5,500.00 in paragraph two but then stated that the settlement amount was $6,519.00 in paragraph three.

The Court issued a Notice of Hearing on this Motion on September 21, 2005 and assigned a hearing for October 11, 2005. At the time the matter was called for hearing, Debtor appeared with her bankruptcy counsel, John E. Pytte, but there was no appearance by Mr. Eichholz or any associate counsel in his office.

The Court conducted its usual inquiry into the nature of Debtor's injury, the question of whether the bankruptcy estate had an interest in the settlement, and whether it was included within Debtor's claim of exemption. It was determined that the Trustee in the case had filed a Report of No Distribution determining that the claim was worth no more than $10,000.00 and that Debtor had claimed that amount as exempt. Accordingly, there was no objection from the Chapter 7 Trustee to the amount of the settlement.

The Court then inquired of Debtor whether she was satisfied with the settlement, and with the attorney's fees that were being sought by Mr. Eichholz in the amount of $2,274.25 (according to the Motion) or $1,937.19 (according to the proposed order). Debtor stated that she had had no communication with Mr. Eichholz's office except

when she was informed that the case had been settled. She also stated that she did not think the settlement was high enough. She described how she had been injured in an automobile collision, continued to suffer as a result of those injuries, and wished to find another attorney. In light of Mr. Eichholz's failure to appear, the Court ruled that the settlement would not be approved and the matter would not be reassigned for another hearing until Mr. Pytte determined that the matter should be reset for a hearing.

On October 12, 2005, Mr. Pytte addressed a letter to the Court that was received on October 17. The letter informed the Court that, after the hearing, Mr. Pytte had met with his client who advised him that Mr. Eichholz's office had already distributed the funds, and that she had spent her share on ordinary living expenses.

Mr. Eichholz has never been appointed by this Court to represent Debtor despite the allegations of the Motion; did not appear at the hearing before the Court pursuant to proper notice; has not obtained an order authorizing the settlement or the disbursement of any funds; is not entitled to any attorney's fees in a case where he has neither been appointed to represent a debtor nor obtained the Court's written authorization to settle the case and to pay himself a fee; and his pleadings in this case were sloppy at best and misleading at worst.

CONCLUSIONS OF LAW

Unfortunately, this is not the first time the Court has observed this type of behavior from Mr. Eichholz. *See* In re Glover, 2003 WL 23811474, *4 (Bankr. S.D. Ga. 2003). In an Order in In re Glover approving Mr. Eichholz's application for employment and his request for attorney's fees entered on June 13, 2003, which ruled on similar requests in those cases, I reduced Mr. Eichholz's fees from

33 1/3% contingent fee in each case, which would been in excess of $8,000.00 total, to $1,000.00 in each case, plus expenses advanced. Although both orders spear for themselves as to the facts which were persuasive, it is a fair summary that the reduction in fees was supported as a result of the following conduct which I found had occurred: (1) Mr. Eichholz failed to appear at the scheduled hearing in each case scheduled for December 18, 2002; (2) had failed to inform the Court, the debtor's bankruptcy counsel, or the trustee concerning the merits of the case; and (3) no other information was provided to assist them or the Court in determining whether the settlements were in the best interest of the debtors, the creditors, or their estates. The Motions were scheduled for further hearing on February 13, 2003, and Mr. Eichholz again failed to appear and was granted a rescheduled hearing on April 17, 2003.

At the hearing on April 17 considerable discussion ensued, because in each case debtors had signed settlement statements in October of 2002 acknowledging prior receipt of their net proceeds from the settlements. This was at a time when the Court had not approved the settlement, nor had the Court approved any attorneys fees, nor had even the initial hearing on those applications been scheduled. When questioned about this, Mr. Eichholz replied that the checks were not written in either case until after the Court had approved the settlement. He was unable to explain why he had filed in Court copies of the settlement statements signed by the debtors reciting that they had in fact been paid in October, but blamed it upon the volume of his practice, turnover in his staff, and the use of a form disbursement documents that he utilized in all personal injury cases, not those specifically tailored to bankruptcy cases where court approval of the settlement is a precondition to disbursement.

Among the findings in the Order dated June 13, 2003, in In re Glover, 2003 WL 23811474, *3 (Bankr. S.D. Ga. 20030, is the following:

> Given the series of actions, omissions, and late-filed motions on the part of Mr. Eichholz regarding these debtors and one other debtor under this Court's jurisdiction, denial of Mr. Eichholz's application for employment would be justifiable.
>
> Nevertheless, in light of the settlements which the Debtors and the Trustee agreed were satisfactory, Mr. Eichholz's employment cannot be said to be entirely without value to Debtor and his bankruptcy estate.

Although that Order did not articulate further reasons for giving Mr. Eichholz the benefit of the doubt, review of the audio recording of the April 17, 2003, hearing reveals the following: Mr. Eichholz began his presentation by stating that he had no excuses for his failure to appear, but that over the past two years believed that the standards for approval of attorney's fees and settlements in the Bankruptcy Court had changed and, as he said, become a "moving target." He asserted that, in the past, he had routinely filed applications for approval of fees, and had had those fees and settlements approved without making a court appearance. Without commenting on this Order on all that occurred in that hearing, and whether or not his characterization of the Court's previous method of handling settlements was accurate, the record also reveals that he sought to excuse his failure to appear at the December 18, 2002, hearing because

he thought everyone had agreed to the settlement and that his appearance was unnecessary, explained his second failure to appear as a result of staff turnover, and concluded by assuring the Court that he would appear "everytime" a matter was scheduled before the Court and "whenever" he needed to be in Court in the future.

He acknowledged that the debtors' signatures on a settlement sheet acknowledging receipt was "in error" and was "premature," and assured the Court that he would amend his settlement statements in all future bankruptcy matters to omit any reference on the client's part to receipt of funds prior to the time that the Court actually acted on and approved the settlement. Notwithstanding serious reservations, these assurances were sufficiently persuasive for me to allow a substantially reduced fee in each of these cases as previously set forth in this Order.

Later that year in In re Dudley, Ch. 13 Case No. 02-41902, Mr. Eichholz persuaded another attorney, not regularly associated with his practice, to appear at a hearing on December 18, 2003, to seek approval of a personal injury settlement and approval of his attorney's fee. When that attorney was questioned, he was quite forthright with the Court and revealed that he had no information concerning the case other than a general understanding of the nature of the automobile collision that the debtor had been involved in, the medical expenses that had been incurred, and the total settlement of $11,160.00. He had no information with which he could support or justify the amount of the fee which Mr. Eichholz was seeking in the amount of 33 1/3 percent. He explained his appearance on Mr. Eichholz's behalf by telling the Court that he had been asked the previous evening at a Christmas party to appear on Mr. Eichholz's behalf.

Furthermore, Ms. Dudley, the client, was called to testify, as is customary, and the Court inquired whether she was satisfied with the settlement and satisfied with services of her attorney. Ms. Dudley was satisfied with the settlement amount, but not with the services of Mr. Eichholz. She informed the Court that she had had minimal contact with Mr. Eichholz, that she had spoken with him when she retained him and on at least one other occasion, but had left several messages that were never returned. As a result, I denied the attorney fee request but approved the settlement. At a subsequent hearing on March 23, 2004, to consider approval of Mr. Eichholz's attorney fees, Ms. Dudley stated that when she appeared at the hearing in December 2003 to be assisted by Mr. Eichholz's substitute counsel, she had to brief him on the case before it was called for a hearing. She stated that she did not feel she had been represented by Mr. Eichholz at all, did not feel that she was treated the way a client should be, and objected to his being paid the full fee that he sought.

At this subsequent hearing, Constance Thomas, then associated with Mr. Eichholz's law firm, made an effective presentation in support of the fee application within the framework of her knowledge of the case, and of Mr. Eichholz's record keeping, but in the final analysis was unable to provide the Court with any specific information as to why Mr. Eichholz had in fact earned a 33 1/3 percent fee in the case. As a result, I allowed a $1,500.00 fee rather than the approximate $4,400.00 which had been requested. Again, the Court in its discretion, at that point, might very well have refused any compensation, but the presence of Ms. Thomas, who is well known to the Court, and her apparently sincerity and effectiveness on behalf of her client and the fee applicant, coupled with Mr. Eichholz's previous representations, persuaded me that he had in fact followed through on what he had previously assured the Court he

would do. That is, that he would ensure that all appearances were timely made in all cases when the Court required it, and in other ways would correct the errors and omissions which had characterized his previous practice before this Court.

For some period of time after the Court rules in Glover, Fuller, and Dudley, Mr. Eichholz responded by improving his office procedures and/or ensuring that counsel regularly associated with his firm made timely appearances in matters scheduled in Court. The conduct in these three recent cases, however, reveals those improvements to have been transitory, and demands more effective action.

This recent pattern of conduct by Mr. Eichholz's office does not meet the standards set by this Court for attorneys representing debtors in personal injury or bankruptcy matters. According to the Bankruptcy Code, no attorney is authorized to represent a debtor in this Court without Court approval. *See* 11 U.S.C. §§ 327 and 329. In many instances, the Court has granted retroactive approval to counsel to represent debtors under certain circumstances. *See* In re Concrete Products, Inc., 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996)("This Court has consistently followed the less rigid line of cases [on retroactive appointments] subject to the requirement that the professional who seeks such employment must show (1) that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated, and (2) that the applicant's failure to obtain prior approval at an earlier time is excusable."); *see also* In re Fuller, 2002 WL 32667474, *2 (Bankr. S.D. Ga. 2002)(stating that "the approval of an attorney retroactively is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made").

Up to this point, Mr. Eichholz has been the beneficiary of this Court's presumption that attorneys duly licensed to practice law in this state who are members of the Bar of the United States District Court, of which this Court is a unit, are presumptively qualified to represent debtors in either bankruptcy or personal injury matters. As a result, this Court has not hesitated to grant retroactive approval of counsel's representation of debtors in personal injury matters when no objection to that representation has been received and when there is nothing in the record to suggest that the attorney is not fully qualified to represent the debtor. In Fuller, Glover, and Dudley this latitude was more than severely tested. In those cases, eight separate hearings were scheduled. Mr. Eichholz appeared in person in only two. He sent associate counsel to one. He sent unqualified counsel to another. He utterly failed to make any appearance in four. As a result, his fee requests in excess of $12,600.00 were reduced to $3,500.00. His conduct improved, as indeed on would have expected. However, that improvement was transitory if not illusory.

Mr. Eichholz's conduct in the three cases before the Court today reveal that he has utterly failed to live up to the previous assurances which he gave the Court, and on which the Court relied, that they type of unprofessional behavior and sloppy work exhibited in prior cases would not be repeated in the future, to wit: (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime this Court required his presence, and he failed to do that in each of these three cases. (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of

the three cases and in some, the amount of settlement or attorney's fees contain significant discrepancies. (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement. (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent. (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to "stand in" for. Egregious examples of this include the circumstances of Mr. Eichholz's sending counsel in the Dudley case based on a request made at a Christmas party the night before the hearing as well as his sending counsel in the Bacon case presently before the Court based on a last minute telephone call the night before the hearing, not from Mr. Eichholz, but from the first attorney whom he entreated to appear as "stand in" counsel.

This conduct makes it clear that Mr. Eichholz is no longer entitled to enjoy the latitude of the Court in granting retroactive approval of his employment to represent debtors in this Court.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that within ten days of this order Benjamin S. Eichholz file with the Court and serve on Debtor's counsel, each case Trustee, and the Assistant United States Trustee,

B. Amon James, an accounting of all funds received and disbursed with regard to any settlement he has entered into on behalf of Debtors, Linda J. Bacon, James L. Forsythe and Janice F. Forsythe, or Sabrina N. Stanley.

FURTHER ORDERED that Benjamin S. Eichholz immediately remit to the case Trustee, pending further Order of the Court, any sums received as a result of any such settlement and not previously disbursed to individuals or parties other than Benjamin S. Eichholz, Attorney at Law.

FURTHER ORDERED in light of the conduct in these cases, and the pattern of prior conduct in similar matters in this Court, that Benjamin S. Eichholz will no longer be granted retroactive approval of his representation of any debtor in this Court. A copy of this Order shall be served on all Chapter 7 and Chapter 13 Trustees in this District and upon the Assistant United States Trustee. Should Mr. Eichholz wish to represent debtors in personal injury cases, he is ordered to file the appropriate application for employment, together with the debtor's written consent, and a copy of any fee or other contract with the debtor, and appear with the debtor when the Motion seeking appointment is scheduled for a hearing.

FURTHER ORDERED that Mr. Eichholz appear on

Thursday, January 13, 2006
at 10:00 o'clock a.m.
Bankruptcy Courtroom 228
United States Courthouse
125 Bull Street
Savannah, Georgia

to show cause why this Court should not make a recommendation of disciplinary action to the Chief United States District Court Judge, pursuant to Local Rule 83.5 of the United States District Court for the Southern District of Georgia. Not later than Wednesday, December 28, 2005, Mr. Eichholz shall file with the Court and serve upon the Assistant United States Trustee his written response to this Show Cause Order.

/s/ Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 2nd day of December, 2005.

Cc: *Baxter*
Massey
Brown
Coleman
Wallace
Souther
Klasinski
Drake
Wasden
Wessinger
Cardwell
Moore
James
Stanley, Sabrina
Pytte
Forsythe
Braziel
Bacon
Gastin
Eichholz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In the matter of:	)
Appeal Number: 06-14476-QQ	)
BENJAMIN S. EICHHOLZ	)

AFFDAVIT OF ABDA LEE QUILLIAN

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Abda Lee Quillian, who, after being duly sworn, deposed and states on oath of her own personal knowledge as follows.

1.

I am over twenty-one (21) years of age. I am suffering under no legal disabilities, and I am competent to give this Affidavit. I make this Affidavit voluntarily based on my own personal knowledge and I know that this information may be used in the above – described litigation and for any other lawful purpose.

2.

I am an attorney, licensed to practice in Georgia and the United States District Court for the Southern District of Georgia since 1985, and I acted as Appellant's substitute counsel during the November 2, 2005 Bankruptcy Court hearings for Linda Bacon-Peters and James and Janice Forsythe.

3.

I have been licensed to practice in the State of Georgia for over twenty years and am a member in good

standing with the State Bar of Georgia. I have had no reprimands or other ethical violations from the State Bar of Georgia during my career as either a private attorney, an Assistant City Attorney for the City of Savannah, or as Assistant County Attorney for Chatham County.

4.

Prior to the November 2, 2005 hearings, I was provided with the information necessary to serve as substitute counsel for Linda Bacon-Peters and James and Janice Forsythe.

5.

The two cases were simple, straightforward personal injury settlements in the gross settlement amounts of $1,000.00 and $7,500.00.

6.

On November 2, 2005, I appeared at the appropriate time for the two hearings, and upon my arrival, I informed the trustee's representative that I was present as counsel for the Debtors and that I was standing in for Mr. Eichholz, and that I was ready to proceed. The trustee's representative informed me that everything was in proper order.

7.

Prior to the commencement of the hearings, I introduced myself to both Ms. Bacon-Peters and Ms. Forsythe and asked whether either of them had any questions or concerns with their settlements. Both parties informed me that they understood why they were at the hearing and indicated that they were satisfied with their respective settlement amounts. At no time did either Ms. Bacon-Peters or Ms. Forsythe ever state to me that Mr. Eichholz had settled their respective case without their authority nor did they express to me any type of concern or displeasure with the manner in which Mr. Eichholz had handled their case.

8.

The case of Linda Bacon-Peters was called first, and at the outset of the hearing, the bankruptcy attorney for the

debtor, Wade Gastin, thoroughly outlined the case and explained that the settlement amount was $1,000.00, with the Appellant receiving $437.50 out of the settlement amount and the Debtor receiving $562.50. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 3-4.

9.

Furthermore, during the Bacon-Peters hearing, it was evident that a clerical error existed in the settlement document where the settlement amount was listed as $25,000.00 instead of $1,000.00. This was a mere transcription error, which I attempted to explain, and was something that could have been easily corrected. Despite the transcription error, Ms. Bacon-Peters attempted to inform the Court that she was pleased with the services rendered by Appellant and that she was satisfied with the settlement. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 12-13.

10.

Through my experience in the practice of law and the information provided to me by both Appellant's office and the clients, I had ample knowledge to provide competent representation to the clients during the November 2, 2005 settlement hearings. Furthermore, due to the straightforward nature of the cases, my experience, in and of itself, allowed to me provide competent representation to the clients.

11.

Had I deemed it necessary to obtain additional information in order to provide competent representation, I could have obtained that information from either Appellant's office, Mr. Gastin or from the clients. However, I did not and I do not believe any additional information was necessary for a settlement hearing.

12.

When the Forsythe matter was called, I anticipated it would go much like the Bacon-Peters matter had just gone, and so when the Judge offered, I requested to be excused

from the matter because it seemed the settlement would not be approved.

13.

In my opinion, Linda Bacon-Peters and James and Janice Forsythe received competent representation from both myself and Appellant.

Further Affiant sayeth not.

/s/ Abda Lee Quillian

Sworn to and subscribed before me
this the 23rd day of January, 2007.

/s/ Jodie S. Mastison
Notary Public, Chatham County, GA
My commission expires April 16, 2010

-11

(2)

No. 07-58

In The
Supreme Court of the United States

IN THE MATTER OF:

BENJAMIN S. EICHHOLZ,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR REHEARING

MichaelWeinstock, Esq.,
Counsel of Record
WEINSTOCK & SCAVO, PC
3405 Piedmont Road N.E.
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Atlanta, Georgia 30305
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I. QUESTIONS PRESENTED

I. WHETHER THE PETITION FOR REHEARING SHOULD BE GRANTED IN VIEW OF THE CLEAR VIOLATION OF PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS AS RECOGNIZED BY THE FIFTH AMENDMENT TO THE CONSTITUTION AND THE LACK OF SPECIFIC PROCEDURAL PROTECTIONS FOR ATTORNEYS.

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IV. BASIS OF JURISDICTION

This is a Petition for Rehearing pursuant to Rule 44 of the Rules of the Supreme Court of the United States.

V. BRIEF STATEMENT OF THE CASE

A. Statement of Material Facts

On December 5, 2006, the United States Bankruptcy Court for the Southern District of Georgia entered a Memorandum and Order requiring Petitioner to show cause why he should not be disciplined for his conduct in three prior bankruptcy cases, In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. (See 59-A). In the Memorandum and Order, the charges against Petitioner by the Bankruptcy Court were as follows: (1) that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval from the client; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (See 71-A to 72-A). The Bankruptcy Court's Memorandum and Order dated

December 5, 2005 did not request Petitioner to show cause, if any, that he properly supervised nonlawyer employees to ensure their conduct was compatible with the professional obligations of lawyers or that he did not assist nonlawyers in the unauthorized practice of law by having office staff members sign pleadings and perform the functions of a lawyer.

On December 15, 2005, Petitioner filed a response to the Bankruptcy Court's Memorandum and Order. (See 39-A). In his response, Petitioner addressed the Bankruptcy Court's allegations, discussing at length the reasons he believed his pleadings to that court contained clerical errors, his intra-office procedures for communicating with the courts and his clients, the reasons for any problems regarding his attendance at the hearings for the above-referenced cases, and his substitute's preparation for the pertinent hearings. (See 39-A to 58-A). In attempting to respond to the Bankruptcy Court's claim that Petitioner performed "sloppy" work, Petitioner stated that "clearly these erroneous amounts were amounts contained in a prior Order that our paralegal, Cindy Barnette, utilized for the preparation of this form." (42-A). Consequently, when the Bankruptcy Court charged Petitioner with sloppy work and Petitioner attempted to explain why the clerical mistake had occurred in the pleadings, Petitioner was lulled into a false sense of security that he could rebut the charges without any reciprocal effect.

On January 13, 2006, the Bankruptcy Court conducted its show cause hearing. (See 27-A). After the judge's introduction, the court stated that the

Petitioner's should begin his opening statement. (See 29-A). During Petitioner's opening statement, Petitioner's counsel attempted to explain Petitioner's office procedures and any issues regarding Petitioner's representation of his clients in the cases in question. (See 30-A to 34-A).

As Petitioner's counsel concluded the opening statement, Judge Dalis, one of the two sitting Bankruptcy Court judges, interjected that he wanted to state his concerns so that Petitioner did not conclude his case without addressing the judge's concern. (See 36-A). Judge Dalis then stated, "[M]y biggest concern involving Mr. Eichholz and his office is the fact that he had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed." (36-A). Further, Judge Dalis stated that Petitioner "allowed -- it appears from what I am reading now in your supplemental response – someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it." (37-A).

On May 26, 2006, the Bankruptcy Court issued its "Proposed Findings of Fact and Recommendation for Disciplinary Action." (See 9-A). The Bankruptcy Court stated that its decision was "based on the testimony at the show cause hearing, on supporting documents from Eichholz and others, and on findings in prior proceedings." (10-A). The Bankruptcy Court noted that the root causes of the events that compelled the court's attention were Petitioner's failure to personally manage his case

files and communicate with associate and nonlawyer staff. (12-A). Additionally, the court found that its recommendation was based, among other things, on the following findings: (1) that nonlawyer staff explained the terms of engagement to prospective clients; (2) that nonlawyer staff explained settlement documents to clients; (3) that nonlawyer staff signed Petitioner's name to pleadings and other court documents; (4) that Petitioner did not prepare or review bankruptcy pleadings before they were filed, (5) that Petitioner's associate signed his name to pleadings; (6) that nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision; and (7) that many documents were filed with numerous clerical errors. (12-A to 13-A). Out of the eleven findings that the Bankruptcy Court based its recommendation on, seven of the claims were based on information Petitioner disclosed to the court at the hearing. Based on the findings from both the hearing and the response from Petitioner to the Bankruptcy Court's prior Memorandum and Order, Petitioner was essentially tricked into incriminating himself.

On July 17, 2006, the District Court, relying on a review of the record alone, accepted the Proposed Findings of Fact and Recommendation that the Bankruptcy Court submitted to it pursuant to Local Rule 83.5(g), and entered an Order suspending Appellant from practicing law in the District Court for a period of two (2) years. (See 5-A).

As a result of the Bankruptcy Court's violation of Petitioner's due process rights, Petitioner is prevented from practicing, ultimately concluding his

career, in the federal court.

VI. REASON FOR GRANTING THE PETITION FOR REHEARING

A. The Petition For Rehearing Should Be Granted In View Of The Clear Violation Of Petitioner's Right To Procedural Due Process And The Lack Of Specific Procedural Protections For Attorneys.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. In this respect, the due process clause recognizes certain procedural safeguards which guarantee that all individuals before the courts be accorded specific fundamental procedures should they be deprived of life, liberty or property; however, the breadth of those safeguards depends on the nature of the proceeding and the interests at stake. See Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961), see, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970). In this context, this Court has recognized that procedural due process safeguards contained in the Fifth Amendment apply to attorney disciplinary hearings due to the quasi-criminal nature of the proceeding. In re Ruffalo, 390 U.S. 544, 550-51, 88 S.Ct. 1222, 1226 (1968).

Under the procedural guarantees recognized by this Court, it is undisputed that when the conduct cited as the reason for discipline does not occur in

the presence on judges in open court, "notice should be given to the attorney of the charges made.'" Ruffalo, 390 at 550 (citing Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377(1917)). Procedural due process further requires an opportunity to be heard before any governmental deprivation of a property interest. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). However, determining the amount of process that is due an attorney in a disciplinary matter requires an examination of the timing and content of the notice and the nature of the hearing will depend upon an evaluation of all the circumstances and an appropriate accommodation of the competing interests involved. See Goss v. Lopez, 419 U.S. 565, 578-579 (1975).

This Court has held that notice to an attorney of the charges against him is inadequate and mandates his federally protected constitutional rights when the disciplinary authority amends or alters the charges against the attorney either (1) at the disciplinary hearing or (2) at a time so late in the proceeding that the attorney has no opportunity to properly prepare to respond to the charges. See Ruffalo, 390 U.S. at 546. In Ruffalo, this Court ruled that an attorney's due process rights were violated when the Ohio State Bar Association failed to provide notice as to the "precise nature of the charges" against the petitioner. Ruffalo, 390 U.S. at 552. In rejecting the bar association's argument, the Court opined that the bar association's argument "overlooks that fact that serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled 'into a

false sense of security.'" Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). Moreover, the Court stated, "[t]he charge must be known ***before the proceedings commence***. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused." Id. at 551. Due to the bar association's failure to provide notice of all charges prior to the commencement of the hearing, the Court found that the petitioner's procedural due process rights had been violated. Id. at 552. The facts of the instant matter are well within the holding at Ruffalo.

Additionally, this Court has never adopted a definite set of factors to determine whether notice to an attorney in a disciplinary action is adequate. Circuit courts and state supreme courts have considered notice inadequate (and therefore a due process violation) when the disciplinary authority makes charges different from those for which the attorney is eventually punished. See In the Matter of the Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981); Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971); Statewide Grievance Committee v. Botwick, 226 Conn. 299, 627 A.2d 901 (1993); Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986). Moreover, courts focusing on the issue of misrepresentation by the disciplining authority have found that the dispositive issue is whether the respondent attorney was apprised of the charges before the commencement of the proceedings against him/her. Johnson, 447 F.2d at 173.

In the case at bar, the United States

Bankruptcy Court for the Southern District of Georgia disregarded Petitioner's procedural guarantee to notice of the charges against him when the court altered the charges against Petitioner after filing its notice. Furthermore, there is no set standard for determining how specific the notice to a potentially disciplined attorney, such as Petitioner, must be; therefore, the courts are able to use the fact finding process as a violation finding process by adding violations against an attorney based on the facts provided at a show cause hearing. Due to the lower court's failure to provide adequate procedural protections and the lack of any defined procedural protections, this Court must grant this Petition for Writ of Certiorari in order to reverse the decision of the Eleventh Circuit Court of Appeals.

Petitioner was deprived of notice that the Bankruptcy Court amended the charges against Petitioner until the conclusion of Petitioner's counsel's opening statement at the January 13, 2006 show cause hearing, resulting in the prejudice to Petitioner, which was irreconcilable at that point. (See 36-A to 37-A). In the Bankruptcy Court's Memorandum and Order, dated December 5, 2005, the Bankruptcy Court gave notice to Petitioner that they were concerned with his inability to attend hearings, his sloppy work, and the possibility that Petitioner had settled cases without his client's approval. (71-A to 72-A). However, the Bankruptcy Court's Memorandum and Order, which provided Petitioner with information regarding the claims against Petitioner, did not make any mention of the court's expressed concerns that Petitioner filed pleadings that he never signed or read, or that

Petitioner had office personnel perform the work of a licensed attorney. (See 59-A to 74-A). As such, when Judge Dalis informed Petitioner's counsel that he wanted Petitioner to address concerns of the court, the court effectively amended the charges against Petitioner.

After Petitioner attempted to explain in his Response to the Memorandum and Order the reasons why he should not be punished for a violation of charges to which he was given notice, the Bankruptcy Court altered its charges and specifically requested that Petitioner address the court's concern that Petitioner allowed "someone not a lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it," (37-A). Furthermore, after Petitioner attempted to address these concerns at the show cause hearing, the Bankruptcy Court filed its recommendation to the district court, basing its recommendation almost completely on its findings regarding the new charges of assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants. (See 9-A to 24-A). Clearly, the charges included in the recommendation are substantially different than those upon which the Bankruptcy Court's initial charges were predicated. Since the Bankruptcy Court amended the charges against Petitioner after Petitioner provided testimony in his response and at the show cause hearing, the initial charges were used as a "trap," and Petitioner's right to procedural due process under the Fifth Amendment was eviscerated.

This Court should further grant this Petition for Rehearing in order to address Petitioner's Due Process violation, and also to set a more defined standard for what constitutes adequate notice to the attorney of the charges. This is a matter of great concern to licensed professionals. As noted above, this Court has never adopted a set of factors to determine what constitutes adequate notice, and since no set of factors has been adopted, courts, such as the Bankruptcy Court in this case, are able to hide their "violation-finding mission" as one of fact-finding. Without a set of factors used to determine the adequacy of notice, attorneys in Petitioner's situation will enter a show cause hearing with the intent to explain their actions, while in reality, the courts are building charges against them.

VII. CONCLUSION

Wherefore, Petitioner respectfully requests that this Court grant the PETITION FOR REHEARING in the instant appeal.

Respectfully submitted this 25th day of October, 2007.

WEINSTOCK & SCAVO, P.C.

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CERTIFICATION OF COUNSEL

Pursuant to Rule 44 of the Rules of the Supreme Court of the United States, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted this 25th day of October, 2007.

WEINSTOCK & SCAVO, P.C.

Michael Weinstock
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explain the surrounding circumstances and facts to the Court and I will take the responsibility of the omission made by our paralegal, Cindy Barnette, and Ms. Quillian.

The improvements instituted by my office during the past couple of years have not been merely "transitory". In fact I personally appeared at the most recent hearing of one of my Applications for Employment and Approval of a Personal Injury Settlement on December 7, 2005. I would like to point out that at that hearing which lasted 3 hours I was completely questioned for the manner in which my office handles our personal injury business and virtually every aspect of my personal injury practice was looked into by the Bankruptcy Judge at that time. I would submit to the Court that a detailed 3-hour hearing concerning the intricacies of what has become one of the State's leading personal injury law practices is not the true intent of a hearings such as this. I patiently waited in Court for 1 ½ hours before the lengthy 3-hour hearing took pace and I can't imagine any reasonable person would feel that this type of extended hearing is appropriate or necessary to approve my employment in a case that had long since been settled, that my appointment had been approved by the Trustee's office, and was merely being held to determine the reasonableness of my 33 1/3% fee on a case that settled for a total amount of $4,000.00.

During my most recent hearing and on page 14 of the Memorandum and Order it has become glaringly apparent to me that the Court's rules for Appointment of Employment are going to be strictly enforced requiring appointment at the beginning of the handling of a personally injury claim rather than receiving the appointment simultaneously with the approval of the settlement. I would submit to the Court that this is a dramatic change in the way that these matter have been held for the better part of the past 25 years or so. In fact the Staff Attorney at the hearing, Andraya Mimms, as well as the debtor's Attorney, Judson Hill, at the most recent

hearing, informed the Court that approximately one-half of all Applications and settlements are handled in the exact same manner as I had handled mine in the past.

As a result of this apparently change in the Courts practical procedures I immediately instructed my entire staff to review all our pending personal injury claims in order to request the Courts appointment early on in the course of my representation of clients who are in Bankruptcy at the time. At this time we have identified 12 pending clients who are presently in Bankruptcy and we are in the process of preparing Approvals for the Employment of our firm in all 12 of those cases.

There also seems to be some concern that when a case is settled that it should be made clear to the insurance company that even though the client has given authority and even thought I have conveyed said authority to the insurance company and all parties have agreed on a settlement amount that I should make it clear to said insurance company representative that the client is in Bankruptcy and the settlement will require formal approval by the Bankruptcy Court.

I submit to the Court that my staff and I will make a conscience effort to have all claims of clients who are in Bankruptcy appropriately noted and I will make my absolute best effort to inform insurance company representatives of the required approval in these types of cases that I handle in the future.

On page 14 of the Memorandum and Order the Court eloquently sets forth the policy of the Court granting retroactive approval to counsel to represent debtors in the Southern District of Georgia. In light of what has been conveyed to me as perhaps a change in this relatively informal standard, I have instituted the above-referenced changes in my office's policies and procedures concerning the handling of claims for clients who are in bankruptcy.

At the present time I do not employ an associate that is licensed to practice in the Southern District of Bankruptcy Court so I will personally attend all future Bankruptcy Approval hearings in the future unless an emergency or planned vacation is scheduled. In those rare instances I will have competent legal counsel who is fully versed in the facts of the particular Bankruptcy case present at the hearing.

I am truly sorry for the errors contained in the pleadings in the Bacon and Forsythe matters. My office has filed numerous pleadings in the cases that I have handled in front of the Court without any clerical errors or other mistakes. There is no excuse for any pleadings to not be perfect; however mistakes are sometimes made and the mistakes in the Bacon and Forsythe matters should clearly had been caught by the reviewing attorney, L. Nicole Hamilton.

I would like to make it extremely clear to the Court that in all future cases such as these whether or not I have an associate handling the approval of the settlement I will personally review all Applications for Employment and all Motions for Approval of Settlements before they are submitted to the Court whether or not I or any other attorney in my office will handle the Approval of same.

On page 15 of the Court's Memorandum and Order the Court points out once again that the form of the Motion for Approval of a Settlement used by my office recites that I have already been approved to serve as counsel to the debtors in their personal injury cases. Obviously the Approval for Employment must be read and approved by the Court first before getting to the Motion for Approval of the Settlement. I do not feel that a form that is to be taken up second by the Court and presupposes an entry of an order continued in the first form is misleading in any way whatsoever. If the Court is going to grant retroactive approval to counsel who represents debtors under certain circumstances it is clearly understandable that the petitions

would be handled in logical sequence at the respective Court hearing. I have not reviewed other Attorneys forms but I feel that my forms are appropriate in view of the fact that both forms were being handled in logical sequence at the respective Bankruptcy hearing. If the Court feels that there is another form that may make this somewhat clearer then obviously I would have no objection to incorporating the preferred form into my office's regular approval forms.

It is entirely incorrect that I have ever settled any case before the Bankruptcy Court without obtaining my client's approval. All of my files are well-documented and not only do I receive my client's approval but for the past 12 – 18 months or so I routinely have had a second member of my staff witness and acknowledge the approval that I receive from my clients. In fact I have a paralegal that gets my clients on the phone for me for this purpose and she stands in my presence during the entire conversation with my clients in which I seek their approval for a settlement.

The Court once again points out that I regularly have substitute counsel stand in for me and this is, in fact, not correct. The only time that I am aware in the last 12 – 18 months or so that I have had substitute counsel stand in for me was in the Bacon and Forsythe matters when I was unfortunately unable to attend the hearing due to the funeral discussed above. I might add that I do recall one other instance recently that the hearing was out of town and I had another attorney handle the hearing for me with another Judge. This hearing was routinely handled without any incident whatsoever and as it turns out the Attorney was not asked to discuss anything about the case other than what was contained in the Application and Petition. It is my information that this hearing was uneventful and not only did I receive retroactive approval of my employment as an Attorney but the settlement was approved along with my fee of 33 1/3% without any incident or discussion. Apparently there is a great deal of difference between the manner in

which different Judges handle these hearings. I am not suggesting that one manner is better than the other; however I am suggesting that the manner of conducting these hearing is glaringly different from Judge to Judge and has also evolved over the past 3 years or so from a rather perfunctory, informal granting of Applications for Employment and Motions for Approval for Personal Injury Settlements to a much more rigid, formal process that seems to be the present policy for at least some of the Judges in the Southern District of Bankruptcy Court. In light of these changes, I obviously have changed my office procedure so that I will be personally present at virtually all, if not all, of these hearings in the future, subject to health or family vacations or other emergences such as a funeral.

In view of the change in my office's procedure I no longer will regularly request the latitude of the Court in granting retroactive approval of my employment to represent debtors in the Court as reflected on the bottom of page 16. I will seek approval soon after I am made aware that one of our clients is in bankruptcy.

In regards to the case of Linda J. Bacon and the case of James L. and Janice Forsythe no disbursements of any monies has been made. I am in receipt of the settlement checks in both cases but no monies have been disbursed in either of these cases. In regards to the Stanley matter this settlement was concluded on September 23, 2005 and I am enclosing a copy of the settlement statements (Exhibit "D"), which reflects the terms of the settlement as well as the disbursement of all settlement proceeds.

I am herewith remitting the sum of $2,274.75 that was received by me in connection with the Sabrina Stanley matter consisting of $2,173.00 in attorneys fee and $101.75 in costs in accordance with the order of the Court.

Respectfully submitted this 15th day of December, 2005.

THE LAW OFFICE OF BENJAMIN SHEFTALL EICHHOLZ, P.C.

By: /s/ Benjamin S. Eichholz
Georgia State Bar No. 24235

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Filed December 5, 2005, 1:18 p.m.

IN THE UNITED STATES BANKRUPTCY COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

LINDA J. BACON
Chapter 13 Case

Number 03-44067

Debtor

JAMES L. FORSYTHE
Chapter 13 Case
JANICE F. FORSYTHE
Number 04-42195

Debtors

SABRINA N. STANLEY
Chapter 7 Case

Number 05-41600

Debtor

MEMORANDUM AND ORDER

FINDINGS OF FACT

Linda J. Bacon

Debtor's case was filed December 17, 2003. On August 12, 2005, a Motion to Settle Personal Injury Claim was filed by Benjamin S. Eichholz, attorney for Ms. Bacon, now known as Linda Peters. On the same date, Mr. Eichholz filed an Application for Approval of his employment as her personal injury counsel. The Court did not enter an Order on that application nor on the motion to settle but scheduled the matter for a hearing on November 2, 2005. When the case was called Ms. Peters was present, her bankruptcy counsel Barbara Braziel was present as well as the Chapter 13 Trustee, however, Mr. Eichholz did not appear. An announcement was made by a member of the Bar that she was appearing as a courtesy to another attorney, not a member of Mr. Eichholz's firm, who had originally agreed to "stand in" as substitute counsel for Mr. Eichholz. The Court questioned substitute counsel to determine her knowledge of the merits of the motion before the Court, and she stated forthrightly that she knew nothing about the merits of the case, but had simply been asked to "stand in" at the hearing, and was doing so as a professional courtesy.

The Motion to Settle states "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 23, ¶ 1). The record reveals that the Court has entered no such Order. The Motion further sets forth that the settlement amount is $1,000.00, $437.50 of which will be due to Benjamin S. Eichholz, and the net of $562.50 to be paid to the Debtor. The Order that was submitted to the Court for approval, however, states "the Motion to Settle Personal Injury Claim is hereby granted that [sic] of LINDA PETER'S settlement of $25,000.00, $8,595.91 will be due to Benjamin S. Eichholz..."

Because Mr. Eichholz's substitute counsel had no knowledge of the case and obviously could not

explain the discrepancies in Mr. Eichholz's pleadings as set forth above, the Court questioned the Debtor. She stated that Mr. Eichholz had called her on one occasion after she hired him and told her that he had obtained a settlement offer in the amount of $2,800.00, which she authorized him to consummate. She later received notification that the amount had been reduced to $1,500.00 and ultimately to $1,000.00. She was provided no explanation as to why the $2,800.00 settlement which she authorized had been reduced, and she gave Mr. Eichholz no authority to settle the case for any lesser amount. She had no idea why any pleadings presented to the Court would have suggested that her settlement was as much as $25,000.00, and at the conclusion of the hearing I took the matter under advisement. However, because Ms. Bacon had not authorized the settlement amount which was being proffered, because Mr. Eichholz had never been approved to represent her, and because he failed to appear at the hearing, I stated that I would not approve his employment and would not approve this settlement. I directed her bankruptcy counsel to confer with her at a later time and inform the Court whether they wished the settlement motion to be placed back on the Court's calendar.

James L. Forsythe
Janice F. Forsythe

Debtor's case was filed July 23, 2004. On August 12, 2005, Benjamin S. Eichholz filed an application seeking the employment of Benjamin S. Eichholz, as personal injury counsel for Debtor, Janice F. Forsythe. On the same date Mr. Eichholz filed a Motion to Settle Personal Injury Claim. The Motion stated: "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 36, ¶ 1). No such Order was ever entered by the Court. The Motion was set for a hearing on November 2, 2005. When the case was

called for hearing. Mr. Eichholz did not appear. Substitute counsel who had made an appearance in the Bacon case, which was called immediately prior to the Forsythe case on the Court's calendar that day and which is referenced earlier in this Order, announced that she wished to be excused from making an appearance in this case. The Court granted that request, after being informed that, similar to the previous case, substitute counsel had no knowledge of the merits of the application or the settlement and had only been contacted the night before the hearing and asked to make the "stand in" appearance.

This Motion sought approval of a settlement of $7,500.00 with $3,158.73 payable to Mr. Eichholz and a net of $3,932.35 payable to the Debtor. However, the proposed order approving the settlement recited that $3,932.35 would be due to Mr. Eichholz and that $3,932.35 would be paid to the Chapter 13 Trustee pending completion of the plan. Because there was no appearance by Mr. Eichholz, Debtors' bankruptcy counsel was not in a position to recommend the settlement, but offered the observation that the Debtor had incurred over $5,000.00 in "hard" medical costs, had had numerous x-rays and an MRI and had been referred to Dr. Roy Baker, a noted neurosurgeon in Savannah. Dr. Baker too a conservative course of treatment and recommended physical therapy to the Debtor, and at this point, the Debtor appears to have recovered from the effects of her injuries. However, bankruptcy counsel made the observation, without knowing more about the case, that with medicals in the $5,000.00 range, with the type of tests required, and the referral to a neurosurgeon, the $7,500.00 settlement did not seem adequate in comparison to counsel's experience in handling similar personal injury claims.

The Court conducted an inquiry of the Debtor, Janice Forsythe, in injured plaintiff, and her

husband, the co-debtor, James Forsythe, and learned the following: The Debtor/Wife seemed more or less resigned to accepting the settlement because her personal injury counsel Mr. Eichholz had urged her to accept it, and because she is, in essence, ready to conclude the mater and move on with her life. However, she stated that she proffered the settlement amount was "too low," and more importantly, that she had not authorized Mr. Eichholz to conclude the settlement. According her to, he had indicated that he would attempt to settle the case for $10,000.00, but had not sought her permission or authority to settle in any amount other than earlier offer of $6,000.00, which she refused.

Neither Mr. nor Mrs. Forsythe ever received any notification from Mr. Eichholz that the case had been settled in any amount, until they received a notice from the Court advising them of the hearing which was scheduled upon Mr. Eichholz's Motion to settle for $7,500.00. Mr. Forsythe called Mr. Eichholz's office when he received the notice and questioned why the case had been settled and who had authorized it. Mr. Eichholz's reply was "you ought to be thanking me for getting you this much money." Neither Debtor nor her husband authorized Mr. Eichholz to enter a settlement.

At the conclusion of the hearing, I ruled that Mr. Eichholz would not be appointed to serve as counsel in this case and that the settlement would not approved because the clients had not authorized the settlement, Mr. Eichholz had not appeared, and it did not appear that the settlement was in the best interest of the Debtors. By subsequent order I required Mr. Eichholz to turn over to the Debtor her file regarding the personal injury claim if she exercised her option to seek other representation.

Sabrina N. Stanley

Debtor filed a Chapter 7 case on June 22, 2005. On August 22, 2005, a Motion to Settle Personal Injury Claim (the "Motion") was filed on her behalf by Benjamin S. Eichholz, attorney for Ms. Stanley. The Motion asserted that "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 11, paragraph 1.) No such order of appointment had ever been sought by counsel or entered by the Court. The Motion was also inconsistent or misleading when it asserted that the settlement amount was $5,500.00 in paragraph two but then stated that the settlement amount was $6,519.00 in paragraph three.

The Court issued a Notice of Hearing on this Motion on September 21, 2005 and assigned a hearing for October 11, 2005. At the time the matter was called for hearing, Debtor appeared with her bankruptcy counsel, John E. Pytte, but there was no appearance by Mr. Eichholz or any associate counsel in his office.

The Court conducted its usual inquiry into the nature of Debtor's injury, the question of whether the bankruptcy estate had an interest in the settlement, and whether it was included within Debtor's claim of exemption. It was determined that the Trustee in the case had filed a Report of No Distribution determining that the claim was worth no more than $10,000.00 and that Debtor had claimed that amount as exempt. Accordingly, there was no objection from the Chapter 7 Trustee to the amount of the settlement.

The Court then inquired of Debtor whether she was satisfied with the settlement, and with the attorney's fees that were being sought by Mr. Eichholz in the amount of $2,274.25 (according to the Motion) or $1,937.19 (according to the proposed order). Debtor stated that she had had no communication with Mr. Eichholz's office except

when she was informed that the case had been settled. She also stated that she did not think the settlement was high enough. She described how she had been injured in an automobile collision, continued to suffer as a result of those injuries, and wished to find another attorney. In light of Mr. Eichholz's failure to appear, the Court ruled that the settlement would not be approved and the matter would not be reassigned for another hearing until Mr. Pytte determined that the matter should be reset for a hearing.

On October 12, 2005, Mr. Pytte addressed a letter to the Court that was received on October 17. The letter informed the Court that, after the hearing, Mr. Pytte had met with his client who advised him that Mr. Eichholz's office had already distributed the funds, and that she had spent her share on ordinary living expenses.

Mr. Eichholz has never been appointed by this Court to represent Debtor despite the allegations of the Motion; did not appear at the hearing before the Court pursuant to proper notice; has not obtained an order authorizing the settlement or the disbursement of any funds; is not entitled to any attorney's fees in a case where he has neither been appointed to represent a debtor nor obtained the Court's written authorization to settle the case and to pay himself a fee; and his pleadings in this case were sloppy at best and misleading at worst.

CONCLUSIONS OF LAW

Unfortunately, this is not the first time the Court has observed this type of behavior from Mr. Eichholz. *See* In re Glover, 2003 WL 23811474, *4 (Bankr. S.D. Ga. 2003). In an Order in In re Glover approving Mr. Eichholz's application for employment and his request for attorney's fees entered on June 13, 2003, which ruled on similar requests in those cases, I reduced Mr. Eichholz's fees from

33 1/3% contingent fee in each case, which would been in excess of $8,000.00 total, to $1,000.00 in each case, plus expenses advanced. Although both orders spear for themselves as to the facts which were persuasive, it is a fair summary that the reduction in fees was supported as a result of the following conduct which I found had occurred: (1) Mr. Eichholz failed to appear at the scheduled hearing in each case scheduled for December 18, 2002; (2) had failed to inform the Court, the debtor's bankruptcy counsel, or the trustee concerning the merits of the case; and (3) no other information was provided to assist them or the Court in determining whether the settlements were in the best interest of the debtors, the creditors, or their estates. The Motions were scheduled for further hearing on February 13, 2003, and Mr. Eichholz again failed to appear and was granted a rescheduled hearing on April 17, 2003.

At the hearing on April 17 considerable discussion ensued, because in each case debtors had signed settlement statements in October of 2002 acknowledging prior receipt of their net proceeds from the settlements. This was at a time when the Court had not approved the settlement, nor had the Court approved any attorneys fees, nor had even the initial hearing on those applications been scheduled. When questioned about this, Mr. Eichholz replied that the checks were not written in either case until after the Court had approved the settlement. He was unable to explain why he had filed in Court copies of the settlement statements signed by the debtors reciting that they had in fact been paid in October, but blamed it upon the volume of his practice, turnover in his staff, and the use of a form disbursement documents that he utilized in all personal injury cases, not those specifically tailored to bankruptcy cases where court approval of the settlement is a precondition to disbursement.

Among the findings in the Order dated June 13, 2003, in In re Glover, 2003 WL 23811474, *3 (Bankr. S.D. Ga. 20030, is the following:

> Given the series of actions, omissions, and late-filed motions on the part of Mr. Eichholz regarding these debtors and one other debtor under this Court's jurisdiction, denial of Mr. Eichholz's application for employment would be justifiable.
>
> Nevertheless, in light of the settlements which the Debtors and the Trustee agreed were satisfactory, Mr. Eichholz's employment cannot be said to be entirely without value to Debtor and his bankruptcy estate.

Although that Order did not articulate further reasons for giving Mr. Eichholz the benefit of the doubt, review of the audio recording of the April 17, 2003, hearing reveals the following: Mr. Eichholz began his presentation by stating that he had no excuses for his failure to appear, but that over the past two years believed that the standards for approval of attorney's fees and settlements in the Bankruptcy Court had changed and, as he said, become a "moving target." He asserted that, in the past, he had routinely filed applications for approval of fees, and had had those fees and settlements approved without making a court appearance. Without commenting on this Order on all that occurred in that hearing, and whether or not his characterization of the Court's previous method of handling settlements was accurate, the record also reveals that he sought to excuse his failure to appear at the December 18, 2002, hearing because

he thought everyone had agreed to the settlement and that his appearance was unnecessary, explained his second failure to appear as a result of staff turnover, and concluded by assuring the Court that he would appear "everytime" a matter was scheduled before the Court and "whenever" he needed to be in Court in the future.

He acknowledged that the debtors' signatures on a settlement sheet acknowledging receipt was "in error" and was "premature," and assured the Court that he would amend his settlement statements in all future bankruptcy matters to omit any reference on the client's part to receipt of funds prior to the time that the Court actually acted on and approved the settlement. Notwithstanding serious reservations, these assurances were sufficiently persuasive for me to allow a substantially reduced fee in each of these cases as previously set forth in this Order.

Later that year in In re Dudley, Ch. 13 Case No. 02-41902, Mr. Eichholz persuaded another attorney, not regularly associated with his practice, to appear at a hearing on December 18, 2003, to seek approval of a personal injury settlement and approval of his attorney's fee. When that attorney was questioned, he was quite forthright with the Court and revealed that he had no information concerning the case other than a general understanding of the nature of the automobile collision that the debtor had been involved in, the medical expenses that had been incurred, and the total settlement of $11,160.00. He had no information with which he could support or justify the amount of the fee which Mr. Eichholz was seeking in the amount of 33 1/3 percent. He explained his appearance on Mr. Eichholz's behalf by telling the Court that he had been asked the previous evening at a Christmas party to appear on Mr. Eichholz's behalf.

Furthermore, Ms. Dudley, the client, was called to testify, as is customary, and the Court inquired whether she was satisfied with the settlement and satisfied with services of her attorney. Ms. Dudley was satisfied with the settlement amount, but not with the services of Mr. Eichholz. She informed the Court that she had had minimal contact with Mr. Eichholz, that she had spoken with him when she retained him and on at least one other occasion, but had left several messages that were never returned. As a result, I denied the attorney fee request but approved the settlement. At a subsequent hearing on March 23, 2004, to consider approval of Mr. Eichholz's attorney fees, Ms. Dudley stated that when she appeared at the hearing in December 2003 to be assisted by Mr. Eichholz's substitute counsel, she had to brief him on the case before it was called for a hearing. She stated that she did not feel she had been represented by Mr. Eichholz at all, did not feel that she was treated the way a client should be, and objected to his being paid the full fee that he sought.

At this subsequent hearing, Constance Thomas, then associated with Mr. Eichholz's law firm, made an effective presentation in support of the fee application within the framework of her knowledge of the case, and of Mr. Eichholz's record keeping, but in the final analysis was unable to provide the Court with any specific information as to why Mr. Eichholz had in fact earned a 33 1/3 percent fee in the case. As a result, I allowed a $1,500.00 fee rather than the approximate $4,400.00 which had been requested. Again, the Court in its discretion, at that point, might very well have refused any compensation, but the presence of Ms. Thomas, who is well known to the Court, and her apparently sincerity and effectiveness on behalf of her client and the fee applicant, coupled with Mr. Eichholz's previous representations, persuaded me that he had in fact followed through on what he had previously assured the Court he

would do. That is, that he would ensure that all appearances were timely made in all cases when the Court required it, and in other ways would correct the errors and omissions which had characterized his previous practice before this Court.

For some period of time after the Court rules in Glover, Fuller, and Dudley, Mr. Eichholz responded by improving his office procedures and/or ensuring that counsel regularly associated with his firm made timely appearances in matters scheduled in Court. The conduct in these three recent cases, however, reveals those improvements to have been transitory, and demands more effective action.

This recent pattern of conduct by Mr. Eichholz's office does not meet the standards set by this Court for attorneys representing debtors in personal injury or bankruptcy matters. According to the Bankruptcy Code, no attorney is authorized to represent a debtor in this Court without Court approval. *See* 11 U.S.C. §§ 327 and 329. In many instances, the Court has granted retroactive approval to counsel to represent debtors under certain circumstances. *See* In re Concrete Products, Inc., 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996)("This Court has consistently followed the less rigid line of cases [on retroactive appointments] subject to the requirement that the professional who seeks such employment must show (1) that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated, and (2) that the applicant's failure to obtain prior approval at an earlier time is excusable."); *see also* In re Fuller, 2002 WL 32667474, *2 (Bankr. S.D. Ga. 2002)(stating that "the approval of an attorney retroactively is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made").

Up to this point, Mr. Eichholz has been the beneficiary of this Court's presumption that attorneys duly licensed to practice law in this state who are members of the Bar of the United States District Court, of which this Court is a unit, are presumptively qualified to represent debtors in either bankruptcy or personal injury matters. As a result, this Court has not hesitated to grant retroactive approval of counsel's representation of debtors in personal injury matters when no objection to that representation has been received and when there is nothing in the record to suggest that the attorney is not fully qualified to represent the debtor. In Fuller, Glover, and Dudley this latitude was more than severely tested. In those cases, eight separate hearings were scheduled. Mr. Eichholz appeared in person in only two. He sent associate counsel to one. He sent unqualified counsel to another. He utterly failed to make any appearance in four. As a result, his fee requests in excess of $12,600.00 were reduced to $3,500.00. His conduct improved, as indeed on would have expected. However, that improvement was transitory if not illusory.

Mr. Eichholz's conduct in the three cases before the Court today reveal that he has utterly failed to live up to the previous assurances which he gave the Court, and on which the Court relied, that they type of unprofessional behavior and sloppy work exhibited in prior cases would not be repeated in the future, to wit: (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime this Court required his presence, and he failed to do that in each of these three cases. (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of

the three cases and in some, the amount of settlement or attorney's fees contain significant discrepancies. (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement. (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent. (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to "stand in" for. Egregious examples of this include the circumstances of Mr. Eichholz's sending counsel in the Dudley case based on a request made at a Christmas party the night before the hearing as well as his sending counsel in the Bacon case presently before the Court based on a last minute telephone call the night before the hearing, not from Mr. Eichholz, but from the first attorney whom he entreated to appear as "stand in" counsel.

This conduct makes it clear that Mr. Eichholz is no longer entitled to enjoy the latitude of the Court in granting retroactive approval of his employment to represent debtors in this Court.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that within ten days of this order Benjamin S. Eichholz file with the Court and serve on Debtor's counsel, each case Trustee, and the Assistant United States Trustee,

B. Amon James, an accounting of all funds received and disbursed with regard to any settlement he has entered into on behalf of Debtors, Linda J. Bacon, James L. Forsythe and Janice F. Forsythe, or Sabrina N. Stanley.

FURTHER ORDERED that Benjamin S. Eichholz immediately remit to the case Trustee, pending further Order of the Court, any sums received as a result of any such settlement and not previously disbursed to individuals or parties other than Benjamin S. Eichholz, Attorney at Law.

FURTHER ORDERED in light of the conduct in these cases, and the pattern of prior conduct in similar matters in this Court, that Benjamin S. Eichholz will no longer be granted retroactive approval of his representation of any debtor in this Court. A copy of this Order shall be served on all Chapter 7 and Chapter 13 Trustees in this District and upon the Assistant United States Trustee. Should Mr. Eichholz wish to represent debtors in personal injury cases, he is ordered to file the appropriate application for employment, together with the debtor's written consent, and a copy of any fee or other contract with the debtor, and appear with the debtor when the Motion seeking appointment is scheduled for a hearing.

FURTHER ORDERED that Mr. Eichholz appear on

Thursday, January 13, 2006
at 10:00 o'clock a.m.
Bankruptcy Courtroom 228
United States Courthouse
125 Bull Street
Savannah, Georgia

to show cause why this Court should not make a recommendation of disciplinary action to the Chief United States District Court Judge, pursuant to Local Rule 83.5 of the United States District Court for the Southern District of Georgia. Not later than Wednesday, December 28, 2005, Mr. Eichholz shall file with the Court and serve upon the Assistant United States Trustee his written response to this Show Cause Order.

/s/ Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 2nd day of December, 2005.

Cc: *Baxter*
Massey
Brown
Coleman
Wallace
Souther
Klasinski
Drake
Wasden
Wessinger
Cardwell
Moore
James
Stanley, Sabrina
Pytte
Forsythe
Braziel
Bacon
Gastin
Eichholz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In the matter of:	)
Appeal Number: 06-14476-QQ	)
BENJAMIN S. EICHHOLZ	)

AFFDAVIT OF ABDA LEE QUILLIAN

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Abda Lee Quillian, who, after being duly sworn, deposed and states on oath of her own personal knowledge as follows.

1.

I am over twenty-one (21) years of age. I am suffering under no legal disabilities, and I am competent to give this Affidavit. I make this Affidavit voluntarily based on my own personal knowledge and I know that this information may be used in the above – described litigation and for any other lawful purpose.

2.

I am an attorney, licensed to practice in Georgia and the United States District Court for the Southern District of Georgia since 1985, and I acted as Appellant's substitute counsel during the November 2, 2005 Bankruptcy Court hearings for Linda Bacon-Peters and James and Janice Forsythe.

3.

I have been licensed to practice in the State of Georgia for over twenty years and am a member in good

standing with the State Bar of Georgia. I have had no reprimands or other ethical violations from the State Bar of Georgia during my career as either a private attorney, an Assistant City Attorney for the City of Savannah, or as Assistant County Attorney for Chatham County.

4.

Prior to the November 2, 2005 hearings, I was provided with the information necessary to serve as substitute counsel for Linda Bacon-Peters and James and Janice Forsythe.

5.

The two cases were simple, straightforward personal injury settlements in the gross settlement amounts of $1,000.00 and $7,500.00.

6.

On November 2, 2005, I appeared at the appropriate time for the two hearings, and upon my arrival, I informed the trustee's representative that I was present as counsel for the Debtors and that I was standing in for Mr. Eichholz, and that I was ready to proceed. The trustee's representative informed me that everything was in proper order.

7.

Prior to the commencement of the hearings, I introduced myself to both Ms. Bacon-Peters and Ms. Forsythe and asked whether either of them had any questions or concerns with their settlements. Both parties informed me that they understood why they were at the hearing and indicated that they were satisfied with their respective settlement amounts. At no time did either Ms. Bacon-Peters or Ms. Forsythe ever state to me that Mr. Eichholz had settled their respective case without their authority nor did they express to me any type of concern or displeasure with the manner in which Mr. Eichholz had handled their case.

8.

The case of Linda Bacon-Peters was called first, and at the outset of the hearing, the bankruptcy attorney for the

debtor, Wade Gastin, thoroughly outlined the case and explained that the settlement amount was $1,000.00, with the Appellant receiving $437.50 out of the settlement amount and the Debtor receiving $562.50. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 3-4.

9.

Furthermore, during the Bacon-Peters hearing, it was evident that a clerical error existed in the settlement document where the settlement amount was listed as $25,000.00 instead of $1,000.00. This was a mere transcription error, which I attempted to explain, and was something that could have been easily corrected. Despite the transcription error, Ms. Bacon-Peters attempted to inform the Court that she was pleased with the services rendered by Appellant and that she was satisfied with the settlement. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 12-13.

10.

Through my experience in the practice of law and the information provided to me by both Appellant's office and the clients, I had ample knowledge to provide competent representation to the clients during the November 2, 2005 settlement hearings. Furthermore, due to the straightforward nature of the cases, my experience, in and of itself, allowed to me provide competent representation to the clients.

11.

Had I deemed it necessary to obtain additional information in order to provide competent representation, I could have obtained that information from either Appellant's office, Mr. Gastin or from the clients. However, I did not and I do not believe any additional information was necessary for a settlement hearing.

12.

When the Forsythe matter was called, I anticipated it would go much like the Bacon-Peters matter had just gone, and so when the Judge offered, I requested to be excused

from the matter because it seemed the settlement would not be approved.

13.

In my opinion, Linda Bacon-Peters and James and Janice Forsythe received competent representation from both myself and Appellant.

Further Affiant sayeth not.

/s/ Abda Lee Quillian

Sworn to and subscribed before me
this the 23rd day of January, 2007.

/s/ Jodie S. Mastison
Notary Public, Chatham County, GA
My commission expires April 16, 2010